Supreme Court, U.S.
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No. 09-410 OCT 1 - 2009

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In The Supreme Court of the United States

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MARTY EVANS, in his individual capacity,

Petitioner,

vs.

JOSEPH GLASS, DANTE DIFRANCESCO,
RALPH CARBONE, DAVID BACHRACH, individually
and on behalf of all others similarly situated, and UBS
FINANCIAL SERVICES, INC., a corporation;
UBS PAINE WEBBER, a corporation;
PAINE WEBBER GROUP, INC., a corporation,

Respondents.

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As a result of unresolved issues arising out of two of the most significant Supreme Court decisions on the determination of reasonable attorneys' fees – *Boeing v. Van Gemert*, 444 U.S. 472 (1980) [hereinafter *Boeing*], and *City of Burlington v. Dague*, 505 U.S. 557 (1992) [hereinafter *Dague*] – conflicts have arisen among the nation's federal courts as to:

Issue No. 1: Whether it is permissible for a court to calculate the fee as a percentage of the amount of money theoretically made available to the class without considering the amount of money actually paid to class members.

(a) If the answer to Issue No. 1 is yes, is it also permissible (to base the fee on the amount made available) when class members are paid directly by the defendant on a claims-made basis, not from a common fund? [The circumstance left unresolved in *Boeing*.]

Issue No. 2: Whether it is permissible for a court to avoid this Court's holding in *Dague*, prohibiting enhancement for contingent risk by calculating the fee using common fund principles. [In other words, does the prohibition in *Dague* only apply when attorneys' fees are calculated pursuant to a fee-shifting statute?]

QUESTIONS PRESENTED – Continued

(a) If the answer to Issue No. 2 is yes, is it permissible to apply common fund principles when, as the instant settlement provides, (i) the attorneys' fee is not paid from a common fund but is paid separately by the defendant (as in fee shifting), and (ii) any court reduction in the requested attorneys' fee benefits the defendant, not class members (as in fee shifting)?

Issue No. 3: Whether, if the answers to Issue Nos. 2 and 2(a) are yes, can a court apply the "exceptional result/superior performance" factors to support an upward adjustment of the fee percentage, or a positive enhancement of the lodestar in a cross-check, based upon a finding that the class's claim was of questionable merit? (Petitioner believes a related issue is currently pending before this Court in *Kenny A. v. Perdue, et al.*, 532 F.3d 1209 (11th Cir. 2008), *cert. granted*, 129 S.Ct. 1907, 2009 LEXIS 2664, 77 U.S.L.W. 3557 (Apr. 6, 2009) (No. 08-970) [hereinafter *Perdue*].)

PARTIES TO THE PROCEEDINGS

The following were parties in the court of appeals and are parties in this Court:

Plaintiff Class Member/
Objector and Petitioner:

Marty Evans, in his individual capacity

Plaintiffs and Respondents:

Joseph Glass, Dante DiFrancesco,
Ralph Carbone, David Bachrach, individually
and on behalf of all others similarly situated.

Defendants and Respondents:

UBS Financial Services, Inc., a corporation;
UBS Paine Webber, a corporation;
Paine Webber Group, Inc., a corporation.

In addition to the above, Shrenik Bavishi and Anthony D'Aria were objectors in the district court and the court of appeals. Mr. Bavishi separately petitioned this Court for certiorari on June 15, 2009, No. 08-10952. Mr. D'Aria separately petitioned this Court for certiorari on September 16, 2009, No. 09-341.

CORPORATE DISCLOSURE STATEMENT
(Rule 29.6)

Petitioner Marty Evans is an individual. He has no corporate parents, subsidiaries, or affiliates that are publicly held.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Marty Evans respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

The Ninth Circuit Court of Appeals' initial Memorandum decision in *Glass v. UBS Financial Services, Inc., etc.*, Nos. 07-15278 and 07-15309, was entered on February 9, 2009 (reprinted at Apps. 13-22), and withdrawn on May 14, 2009 (reprinted at Apps. 11-12). An amended Memorandum decision was filed on May 14, 2009 (*Glass*, 2009 U.S. App. LEXIS 10328), and is reprinted at Apps. 1-10. The Ninth Circuit's order denying Petitioner's and one other objector's petitions for rehearing and for rehearing en banc was filed on May 18, 2009, and is reprinted at Apps. 74-76. All were unpublished.

The Ninth Circuit Court of Appeals' Decision affirmed the U.S. District Court for the Northern District of California's Order Granting Joint Motion for Final Approval; Judgment, filed January 26, 2007, and the Order (1) Granting Joint Motion for Final Approval of Settlement; (2) Granting Class Counsel's Application for Attorney's Fees, Costs and Class Representative Enhancements, filed January 26, 2007. The district court's orders and judgment were not officially reported but are reprinted at Apps. 23-30, and 31-73, respectively.

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STATEMENT OF JURISDICTION

The amended Memorandum decision of the Court of Appeals for the Ninth Circuit was entered on May 14, 2009 (App. 1). Two petitions for rehearing and for rehearing en banc, one of which was Petitioner's, were denied May 18, 2009 (App. 74). On August 7, 2009, Justice Kennedy granted Petitioner a 45-day extension of time within which to file a Petition for Writ of Certiorari to and including October 1, 2009. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATUTES AND RULES INVOLVED

1. 29 U.S.C. § 216(b), Fair Labor Standards Act (FLSA):

> The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and cost of the action.

2. 15 U.S.C. § 77z-1(a)(6), Private Securities Litigation Reform Act of 1995 (PSLRA):

> Total attorneys' fees and expenses awarded by the court to counsel for the

> plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

3. 28 U.S.C. § 1712(a), Class Action Fairness Act of 2005 (CAFA):

> [A]ny attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

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INTRODUCTION

> It is in the interest of all the participants in the class action – save the absent members of the class – to settle class actions by collusively transferring money from the class to class counsel. As long as plaintiffs' lawyers are willing to act in a self-interested way, they will be rewarded by defendants with extraordinary fees funded at the expense of the class. Courts will not effectively monitor the abuse because of their interest in seeing cases settled. . . .
>
> * * *
>
> Our experience and the available evidence of class action practice [combined with] our understanding of the incentives built into the present system sustains our conviction *that collusion and inadequate representation are*

> *everyday features of the class action world – a scandalous state of affairs.*

Susan P. Koniak and George M. Cohen, *In Hell There Will Be Lawyers without Clients or Law*, 30 HOFSTRA L. REV. 120, 155 (2001) (emphasis added).

The issues upon which Supreme Court review is sought all involve important federal questions concerning how reasonable attorneys' fees are calculated in class actions. Each of the issues reflects a way in which the plaintiffs' class action bar, through an accommodation with the defendants it sues, has manipulated the structuring of class action settlements to maximize its attorneys' fees and reduce class member recoveries. Lack of resolution of these issues has resulted and will continue to result in unwarranted and excessive attorneys' fee awards[1] to plaintiffs' class action lawyers in the millions, tens of millions, and collectively hundreds of millions of dollars.

There are three reasons why the Supreme Court should grant this Petition.

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[1] The latest class action attorneys' fee abuse, which this Petition seeks to prevent, involved California class action covering nearly a million class members. The class action lawyers received a $25 million attorneys' fee based upon a purported $500 million settlement value. However, this value turned out to be preposterous since only 75 people received $37,500 from the settlement. *See* Ashby Jones, *The Ford Rollover Litigation: The Scoop on the Coupons*, THE WALL STREET JOURNAL, Aug. 3, 2009 (available 9/28/09 at http://blogs.wsj.com/law/2009/08/03).

1. The issues raised regarding the awarding of reasonable attorneys' fees in class actions have already been identified by federal courts of appeal and district courts as being unresolved by this Court and are causing confusion and conflict among the circuits.

(a) Issue No. 1: The Honorable Sandra Day O'Connor, Supreme Court Justice Ret., in *International Precious Metals Corp. v. Waters, et al.*, 530 U.S. 1223 (2000) [hereinafter *Waters*], stated her opinion that the question of whether, in awarding reasonable attorneys' fees from a common fund, federal courts must consider the amount of money actually received by class members, not merely the amount of money theoretically made available to the class, was an issue that deserved this Court's attention.

(b) Issue No. 1(a): This Court in *Boeing* acknowledged that its decision did not address attorneys' fee awards in claims-made settlements. Judge William Young of the District Court of Massachusetts, in a thorough review of Issue No. 1(a) (*see* Apps. 77-107), acknowledged the conflicting judicial opinions on this issue and comes out in favor of Petitioner's position, which is contrary to the holding of the Ninth Circuit Court of Appeals.

(c) Issue No. 2: Whether this Court's holding in *Dague*, prohibiting enhancement of the lodestar for contingent risk, applies when attorneys' fees are awarded from a common fund rather than pursuant to a fee-shifting statute has been the subject of conflicting holdings by district courts and circuit courts of appeals throughout the country.

(d) Issue No. 2(a): This issue represents the latest Darwinian adaption by the plaintiffs' class action bar to maximize their attorneys' fees at the expense of class member recoveries by creating a Rube Goldbergian settlement structure in which courts have permitted attorneys' fees to be calculated using lodestar multipliers.

(e) Issue No. 3: The awarding of an attorneys' fee of $11,250,000, including a 1,100 percent lodestar enhancement, was justified based upon the exceptional result and superior skill of Class Counsel. The district court believed that the case was of questionable merit in light of a Department of Labor opinion letter published after the settlement was reached, which determined that stockbrokers were exempt under the FLSA, and that therefore both the size of the settlement and Class Counsel's legal skills were exceptional.

2. Apart from the significance of these fee issues from an attorneys' fee jurisprudential perspective, as a practical matter every year that these issues are not resolved, hundreds of millions of dollars (and over an extended period of time billions of dollars) of class member recoveries will continue to be siphoned out of class action settlements to plaintiffs' class action lawyers in the form of excessive attorneys' fees, or to defendants in the form of settlement reversions.

The importance of these issues is reflected in the enormity of the attorneys' fees now being awarded in class actions. For example, in *Enron*[2] a fee of $688 million fee was awarded to class counsel. The size of the attorneys' fee awards now generated by class action settlements, which could not have been imagined by the creators of Rule 23, underscores the urgency of resolving the issues raised in this Petition.

3. Finally, this Court should grant this Petition because class action issues, particularly attorneys' fee issues, do not regularly come before this Court. The plaintiffs' class action bar and defendants have skillfully developed techniques to ensure that such issues are rarely exposed to Supreme Court review.

> Because a large proportion of class actions settle[ ] or [are] resolved in a way that overtakes procedural matters, some fundamental issues about class actions are poorly developed. . . . But, the more fundamental the question and the greater the likelihood that it will escape effective disposition at the end of the case, the more appropriate is an appeal. . . .

Blair v. Equifax Check Services, Inc., 181 F.3d 832, 835 (7th Cir. 1999) (Easterbrook, J.).

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[2] *In re Enron Corporation Securities, Derivative & "ERISA" Litigation*, MDL No. 1446, Civ. No. H-01-3624 (con.) (S.D. Tex., Houston Div.) (Conclusions of Law, Findings of Fact, and Order re Award of Attorneys' Fees from Settlement Fund (Dkt. 6026), filed 9/8/08).

It is unlikely this Court will get another opportunity to review these issues in the near future. For example, the issue not addressed in *Boeing* has been left unresolved for nearly three decades; the dispute regarding the implications of *Dague* on common fund fee awards has now been unresolved for 17 years, and the issue raised by *Waters* has not been addressed by the Court for nearly a decade. Unfortunately (for class members), the plaintiffs' class action bar has successfully turned this Court's failure to rule on these issues into an invitation to request excessive attorneys' fees. Denial of certiorari will only serve to perpetuate the practices that overcompensate plaintiffs' class action lawyers. It should come as no surprise therefore that Judge Richard Posner has observed that "inflated attorneys' fees are an endemic problem in class action litigation. . . ." *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 287 (7th Cir. 2002).

Fortunately, the necessity of immediate review of these issues is matched by the unique suitability of this case as a vehicle for addressing the questions presented.

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STATEMENT OF THE CASE

Petitioner seeks review of the Ninth Circuit's affirmance of a district court class action attorneys' fee award of $11,250,000, calculated as a benchmark 25 percent of a maximum theoretical settlement value of $45 million. In actuality, Defendant distributed only $21[3] million to class members. Using a lodestar cross-check, the district court approved the fee, including a multiplier "of at least ten,"[4] based upon an unknown lodestar.

The class consisted of over 10,000 stockbrokers employed by Defendant UBS. The complaint alleged that UBS improperly classified these employees as exempt, in violation of the FLSA.

Petitioner Marty Evans is a UBS stockbroker who objected to both the proposed settlement and the attorneys' fee request. The trial court approved the settlement and attorneys' fees as requested, and Objector's appeal to the Ninth Circuit was unsuccessful.

The relevant facts of this case begin *before* June 30, 2006, the date of the district court's filing of *Glass v. UBS Financial Services, Inc.*, No. C-06-04068 MMC, in the Northern District of California. Five months earlier, on January 31, 2006, as part of the mediation of another class action, the parties negotiated the *Glass* settlement. The parties settled the case *before* a complaint was even filed; there was no active litigation – no motion practice (no motion for class certification, no motion to dismiss, no motion for summary judgment); no formal discovery (no interrogatories, no depositions, no requests for production of documents), and no trial.

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[3] $21,133,928.

[4] *Glass v. UBS Financial Services, Inc.*, No. C-06-04068 MMC (N.D. Cal., San Francisco Div.), Hr'g Tr. 1/19/07 (Dkt. 238), at 71:5-7.

Class Counsel and Defendant structured the settlement so that Defendant would not be obligated to pay more than $45 million to settle the case and class members could make claims against the Defendant up to a maximum of $33 million.[5] The parties furthermore agreed that Class Counsel's attorneys' fee would be paid separately by the Defendant and would be 25 percent of the maximum settlement payment, rendering a fee of $11,250,000. The settlement provided that all unclaimed funds would revert to the Defendant UBS, as well as any portion of the agreed attorneys' fee not awarded by the court. (App. 34).

In approving the fee request, the district court justified a multiplier of at least 10 as follows:

> The early settlement of the instant action resulted in significant benefit to the class, however. In light of the recent Opinion Letter of the Department of Labor, issued November 27, 2006, *defendants likely would not agree to as large a settlement, or indeed any settlement*, if the parties were attempting to negotiate a settlement today. Class counsel expressly recognized the negative impact an opinion letter could have on the

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[5] The proposed settlement provided for a maximum $45,000,000 settlement payment, from which attorneys' fees and litigation costs and incentive awards would be deducted. (*See* App. 33).

instant litigation well before the November 27, 2006 Opinion Letter was issued. (. . . ([N]oting "[t]he whole idea that stockbrokers can recover for improper wage deductions or sue for overtime is clearly a novel one . . . [and] a new opinion letter could end this genre as quickly as it did a few years ago when the Department of Labor wrote that insurance adjusters were exempt from overtime").) Class counsel achieved an excellent result for the class members by settling the instant action promptly.

* * *

Class counsel's prompt action in negotiating a settlement while the state of the law remained uncertain should be fully rewarded. (Apps. 68-69 (citation omitted; emphasis added); App. 70).

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REASONS FOR GRANTING THE WRIT

I. In Awarding Reasonable Attorneys' Fees in Class Actions, Courts Must Consider the Amount of Money Actually Received by Class Members

Issue No. 1.

Review is necessary to resolve the dispute among the nation's federal courts as to whether, in determining a reasonable attorneys' fee paid from a common fund, it is permissible for a court to calculate the fee as a percentage of the amount of

> money theoretically made available to the class without considering the amount of money actually paid to class members?

Can reasonable attorneys' fees in a class action be calculated as a percentage of the amount of money merely made available to class members, without consideration of the amount of money actually paid to class members? Both the trial court and the Ninth Circuit Court of Appeals ruled that the fee should be calculated as a percentage of the money being made available to settle the case – $45 million rather than the $21 million that was actually paid to class members.

This precise issue was raised in a petition for certiorari filed nearly a decade ago in *Waters, supra*. In that case, the Honorable Sandra Day O'Connor, Supreme Court Justice Ret., denied certiorari on standing grounds.[6] Writing in support of Petitioner's position, however, she explained:

> In *Boeing v. Van Gemert*, 444 U.S. 472 (1980), we upheld an award of attorney's fees in a class action where the award was based on the total fund available to the class rather than the amount actually recovered. *Boeing*, 444 U.S. at 480-481. We had no occasion in *Boeing,* however, to address whether there

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[6] Because the petitioning defendant had agreed, as a term of the settlement, to the method of calculation of class counsel's attorneys' fee and had also agreed not to oppose class counsel's attorneys' fee request.

> must at least be *some* rational connection between the fee award and the amount of the actual distribution to the class. The approval of attorney's fees absent any such inquiry could have several troubling consequences. *Arrangements such as that at issue here decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery.* They potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class. And they could encourage the filing of needless lawsuits where, because the value of each class member's individual claim is small compared to the transaction costs in obtaining recovery, the actual distribution to the class will inevitably be minimal. The Court of Appeals have differed in their approaches to the problem. Compare *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 852 (CA5 1998) (District Court did not abuse its discretion in basing fee award on actual payout rather than reversionary fund), with *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (CA9 1997) benchmark for fee award is 25% of entire fund, and District Court abused its discretion in basing award on actual distribution to class).

Waters, 530 U.S. at 1224 (emphasis added).

Petitioner believes, as Justice O'Connor indicates, that the Court's original holding in *Boeing* should be reconsidered. This position is confirmed by the fact that:

(i) Congress, in the Private Securities Litigation Reform Act of 1995 (hereinafter PSLRA), has mandated that the calculation of reasonable attorneys' fees in securities class actions must be based upon the amount of money actually received by the class.

> Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

15 U.S.C. § 77z-1(a)(6); and,

(ii) Congress, in the Class Action Fairness Act (hereinafter CAFA), again specifically legislated in coupon class action settlements that attorneys' fees could not be calculated based upon the maximum value of the coupons made available, but rather the amount of coupons actually used by class members.

> [A]ny attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

28 U.S.C. § 1712(a).

This Petition has been made necessary because of a practice that class action lawyers use to game the system and obtain excessive attorneys' fees by trading a higher fee from the defendant for an offsetting lower payment to the class. In a reversionary settlement, any amount not claimed by class members reverts to the defendant. It works as follows: Assume that the class action lawyers and defendant have reached an understanding to settle the class action for a payment by the defendant of $5 million. Out of this sum, the lawyers seek a fee of 25 percent of the recovery, or $1,250,000. By colluding with each other at the class's expense, both the class lawyers and the defendant can improve their respective positions. Instead of proposing a $5 million pro rata settlement, the parties agree to a theoretical $10 million reversionary settlement. This increases the lawyers' anticipated 25 percent fee to $2,500,000, with the parties expecting that defendant's payment of claims will fall below $3,750,000.

These machinations by plaintiffs' counsel in class actions – claiming excessive fees based on the purely theoretical gross settlement values in reversionary settlements – result in exorbitant plaintiffs' counsel's fee awards, which are totally unconnected to any benefit actually conferred upon the class. (*See supra* note 1, at 4). The district court (and the Ninth Circuit) refused to consider the basic policy issues underlying the PSLRA and CAFA.

> The Ninth Circuit has held, however, that the district court must award fees as a percentage of the entire fund, or pursuant to the lodestar method, not on the basis

> of the amount of the fund actually claimed by the class. *See Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). Contrary to Evans' argument, the Court finds inapplicable the Class Action Fairness Act's provision that "any attorney's fee award to class counsel that is attributable to the award of . . . coupons shall be based on the value to class members of the coupons that are redeemed." *See* 28 U.S.C. § 1712(a). That statute, on its face, does not apply to non-coupon settlements. (App. 70).

Only when class counsel's fee is based on actual class member distributions will the interests of class counsel be aligned with those of their clients. Any other outcome encourages the creation of further Ford rollover embarrassments (*see supra* note 1, at 4) to our legal system.

The district court, in support of its decision, cites *Williams v. MGM-Pathe Communications Co.,* 129 F.3d 1026 (9th Cir. 1997) (*see* App. 70), the Ninth Circuit case that *requires* that district courts base their fee awards on the nominal maximum settlement amounts; district courts do not even have discretion to base the fee on the amount actually distributed to the class.

> We conclude that the district court abused its discretion by basing the fee on the class members' claims against the fund rather

> than on a percentage of the entire fund or on the lodestar.

Williams, 129 F.3d at 1027.

The Ninth Circuit opinion, although not specifically mentioning *Williams*, states:[7]

> Further, the court's calculation of 25% of the total award, rather than 25% of the amount actually collected by the class, was proper, and was in line with Ninth Circuit precedent. *See* [*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)] (discussing awards of 25% of *the common fund* as benchmark figure). (Apps. 8-9).

As Justice O'Connor noted, the Ninth Circuit[8] decision directly conflicts with the decision of the Fifth Circuit in *Strong v. BellSouth Telecomm. Inc.*, 137 F.3d 844 (5th Cir. 1998). In *Strong*, the Fifth Circuit stated its view that *Boeing* was not controlling because:

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[7] However, *Williams* was not decided under the PSLRA.

[8] In *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007), the district court had awarded attorneys' fees as a percentage of the claims made by the class, rather than a percentage of the gross settlement amount. The Second Circuit reversed, citing *Williams* in support of its reversal. *Wilhelmina* is not directly on point since the money not awarded to the class did not revert to the defendant but rather was distributed by way of *cy pres*.

> [T]he absence of any fund and because the value of the settlement was contingent on class members' desire to continue the plan as well as their eligibility for the credit, we reject the contention of plaintiffs' counsel that the district court abused its discretion by not basing the attorneys' fee award on the $64 million 'common find' value.

Strong, 137 F.3d at 852, while the *Williams* court reached its conclusion based upon a conflicting interpretation of *Boeing*:

> [T]he [Boeing] Court concluded that the attorneys for a successful class may recover a fee based on the entire common fund created for the class, even if some class members make no claims against the fund so that money remains in it that otherwise would be returned to the defendants.

Williams, 129 F.3d at 1027.

Numerous district courts throughout the country have adopted Petitioner's position:

> *In re Bolar Pharmaceutical Co. Sec. Litig.*, 800 F. Supp. 1091, 1095 (E.D.N.Y. 1992) ("ban on fee enhancement for contingency in statutory fee-shifting cases extends to equitable fund cases").
>
> *Wise v. Popoff*, 835 F. Supp. 977, 981 (E.D. Mich. 1993) (a legal fee fixed in relation to a maximum available fund rather than benefits actually realized is not a desirable general rule).

Duhaime v. John Hancock Mut. Life Ins. Co., 989 F. Supp. 375, 380 (D. Mass. 1997) (fee award should be proportionate to the actual value created for the class).

Lyons v. Scitex Corp., 987 F. Supp. 271, 279 (S.D.N.Y. 1997) (before awarding fees, the court must determine what portion of the settlement fund will actually be paid to plaintiffs).

In re Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 337 n.116 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999) (the benefits actually received and used by plaintiffs will be critical in determining the amount of a reasonable fee award).

In re Compact Disc Minimum Advertised Price Antitrust Litig., 292 F. Supp. 2d 184, 190 (D. Me. 2003) ("I have determined to delay [the] award of attorney fees until experience shows how many vouchers are exercised and thus how valuable the settlement really is.").

At stake in this dispute is literally hundreds of millions of dollars in attorneys' fees to be paid to class action lawyers or kept by defendants, which would otherwise be used to reimburse class members for their losses. It is important that this Court establish uniform guidelines regarding the proper relationship between class counsel's fees and actual distributions to class members. There is no reason to limit this methodology to securities and coupon class action settlements.

II. *Boeing* Should Not Be Extended to Claims-Made Class Action Settlements

Issue No. 1(a).

> If the answer to Issue No. 1 is yes, is it also permissible (to base the fee on the amount made available) when class members are paid directly by the defendant on a claims-made basis, not from a common fund? [The circumstance left unresolved in *Boeing v. Van Gemert*, 444 U.S. 472 (1980)].

If this Court does not reconsider *Boeing*, it should ensure that *Boeing* is not extended to claims-made settlements.

Recently, a thorough review and analysis of the issues surrounding this question was authored by the Honorable William C. Young of the United States District Court for the District of Massachusetts.[9] The full opinion is included at Apps. 77-107, *In re TJX Companies Retail Security Breach Litigation*, 584 F. Supp. 2d 395 (D. Mass. 2008). Judge Young agrees with Petitioner's position that the proper calculation of class counsel's fee in claims-made settlements like this one should be based upon the money actually received by the class.

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[9] Judge Young's analysis was most recently adopted by the Honorable I. Leo Glasser, Senior District Judge for the Eastern District of New York, in *Parker v. Time Warner Entertainment Co., L.P., et al.*, No. 98-cv-04265 (ILG) (JMA), 2009 U.S. Dist. LEXIS 57162 (July 6, 2009), at *2-*70.

Judge Young notes at the outset:

> Indeed, the Supreme Court in Boeing expressly refrained from ruling on the question of whether its decision was applicable to circumstances in which a class action judgment did not create a common fund but rather required a defendant "to give security against all potential claims." 444 U.S. at 480 n.5. (Apps. 89-90).

He goes on to observe that:

> There was no common fund created. . . . (Apps. at 90).

> According to class counsel, the litigation produced over $200,000,000 in benefits for the class. . . . [H]owever, class members had claimed just over $6,100,000 in benefits. . . . (Apps. 86 and 86-87).

Judge Young, in describing the class action mechanism as "broken" (App. 98), gives his reasons in support of calculating the fee as a percentage of the amount of money actually paid to the class:

> [T]he valuation of benefits created by [the] litigation [were] "illusory." (App. 90).

> [O]nly a fraction of any given class is likely to claim the benefits provided for in a settlement. . . . [A]ttorneys for each side bargain knowing that this is true. (Apps. 93 and 95).

> "[T]he proportionality of the fee to the relief actually accruing to the class is an . . . important consideration in assessing the reasonableness of the fee award." (App. 91; citation omitted).
>
> At bottom, class action litigation should benefit the individuals who have been harmed. . . . [The parties should be encouraged] to adopt mechanisms that lend themselves toward getting benefits to the consumer. (Apps. 97 and 92).
>
> This approach will not only encourage more realistic settlement negotiations and agreements, but also will drive class counsel to devise ways to improve how class action suits and settlements operate. (App. 98).
>
> Linking attorneys' fees to claims serves two additional objectives. First, it prevents "windfalls" for attorneys created by "class apathy." . . . [T]he failure to link fees to benefits claimed thus "could encourage the filing of needless lawsuits." (Apps. 87 (citation omitted) and 100, *citing* Justice O'Connor in *International Precious Metals Corp.*, 530 U.S. at 1223).

This Petition addresses the question left pending in *Boeing*:

> Nothing in the court's order made Boeing's liability for this amount contingent upon the presentation of individual claims. Thus, we

> need not decide whether a class-action judgment that simply requires the defendant to give security against all potential claims would support a recovery of attorney's fees under the common-fund doctrine.

Boeing, 444 U.S. at 481 n.5, since the settlement hereunder review was structured so that the Defendant deposited no money into a fund in the court for class members. Rather, the Defendant agreed to pay from its own resources valid class member claims up to a maximum of $33 million. Adopting Judge Young's approach would protect district courts from unwitting involvement in settlements that do more to benefit plaintiffs' counsel and defendants than they do to compensate injured class members.

III. The *Dague* Prohibition against Enhancement for Contingent Risk Should Apply When Determining a Reasonable Attorneys' Fee under Both Statutory Fee-Shifting and Common Fund Principles

Issue No. 2.

> Review is necessary to resolve the dispute among the nation's federal courts as to whether, in determining a reasonable attorneys' fee in a class action, it is permissible for a court to avoid this Court's holding in *City of Burlington v. Dague*, 505 U.S. 557 (1992) [hereinafter *Dague*], prohibiting enhancement for contingent risk by calculating the fee using common fund principles? [In other words, does the prohibition in

Dague only apply when attorneys' fees are calculated pursuant to a fee-shifting statute?]

In *City of Burlington v. Dague,* 502 U.S. 1071 (1992), at 1071, this Court granted review of the following question:

> May a court, in determining a reasonable attorney's fee award under [a fee-shifting statute], enhance the fee award above the lodestar amount in order to reflect the fact that the attorneys had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all?

This Court answered the question as follows:

> [W]e hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue. We reverse the Court of Appeals' judgment insofar as it affirmed the 25% enhancement of the lodestar.

Dague, 505 U.S. at 567.

This Petition raises the question not yet addressed by this Court of whether federal courts can avoid the *Dague* prohibition in class actions brought under statutes with fee-shifting provisions by awarding attorneys' fees using common fund principles.

Since this Court's decision in *Dague*, controversy has reigned among district courts and courts of appeal throughout the country as to whether the *Dague* prohibition against enhancement for contingent risk is limited to cases in which reasonable attorneys' fees are awarded under fee-shifting principles or whether it applies to reasonable attorneys' fees calculated from common fund recoveries as well.

> *The Supreme Court has not yet decided* whether its decision in *Dague* precluding the use of a multiplier in consideration of risk taken when calculating fees under the lodestar method applies in common fund cases. . . .

Brytus v. Spang & Co., 203 F.3d 238, 243 (3d Cir. 2000) (citations omitted; emphasis added).

> *Although the Supreme Court has not addressed* whether this prohibition also applies in common fund cases, the district court found "the Court's reasoning for excluding risk enhancements in fee-shifting cases applies equally to common fund cases." In addition, the court also took notice that jurisdictions are split as to the application of risk enhancements in the common fund context.

In re Prudential Ins. Co. of America Sales Practices Litig., 148 F.3d at 341 (emphasis added).

Petitioner asks this Court to clarify its *Dague* holding on this point. The Federal Judicial Center[10] has noted the various contending judicial positions on whether the *Dague* prohibition extends to a determination of reasonable attorneys' fees under common fund principles as well.

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[10] For a general discussion of conflicting circuit and district court interpretations of *Dague*, *see* Alan Hirsh and Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 49, 70-71 (Fed. Jud. Center 1994).

The Ninth Circuit stated in *In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291 (9th Cir. 1994):

> The concerns that drove the Court to reject contingency enhancements in the statutory fee context apply with much less force in common fund cases. Unlike statutory fee-shifting cases where the winner's attorneys' fees are paid by the losing party, attorneys' fees in common fund cases are not paid by the losing defendant, but by members of the plaintiff class. . . .
>
> * * *
>
> The bar against risk multipliers in statutory fee cases does not apply to common fund cases.

Id. at 1299-1300, as did the Seventh Circuit in *Florin v. NationsBank of Georgia, N.A.*, 34 F.3d 560, 564 (7th Cir. 1994):

> In any event, we conclude that the holding in *Dague* should not extend to this case. As we have explained, common fund principles properly control a case which is initiated under a statute with a fee-shifting provision, but is settled with the creation of a common fund. *Dague*, by its terms, applies only to

> statutory fee-shifting cases, and its reasoning is largely based on the statutory language of fee-shifting provisions.

But see In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 822 (3d Cir. 1995) ("to the extent that the district court relied on the lodestar method, it erred by applying a multiplier . . . [t]he Supreme Court . . . has rejected the use of multipliers to enhance the lodestar's hourly rate amount") (applied to de facto common fund); and *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 619 (1st Cir. 1992) (Lay, J., concurring) ("I can discern no logical distinction between an equitable fund case and a fee-shifting case that would cause these [*Dague's*] reasons to be worthwhile in [fee-shifting but not in] an equitable fund case.").

Numerous federal district courts throughout the country have adopted Petitioner's position that this Court's decision in *Dague* to prohibit enhancement of the lodestar for contingent risk also applies to cases where reasonable attorneys' fees are paid from a common fund:

> *Nensel v. Peoples Heritage Financial Group*, 815 F. Supp. 26, 28 (D. Me. 1993) ("[T]he Court can see little, if any, basis to distinguish in the application of the holding in *Dague* between fee shifting and common fund cases.").
>
> *Trief v. Dunn & Bradstreet Corp.*, 840 F. Supp. 277, 284-85 (S.D.N.Y. 1993) ("The language

> of the [*Dague*] opinion, however, strongly suggests that the Court's holding is applicable to common fund cases. . . .").
>
> *In re Prudential Ins. Co.*, 962 F. Supp. 572, 581 n.24 (D.N.J. 1997) ("[T]he Court's reasoning [in *Dague*] for excluding risk enhancements in fee-shifting cases applies equally to common fund cases.").

These courts have found that the concerns which this Court expressed in *Dague* as reasons to prohibit contingency risk in fee-shifting cases apply as well to fee calculations in common fund cases.

> Each consideration enunciated by the *City of Burlington* court declining to permit enhancement of the lodestar is equally relevant to the question of whether the lodestar should be enhanced in this case. . . . [I]ts applicability is not limited to the context of federal fee-shifting statutes.

Trief v. Dunn & Bradstreet Corp., 840 F. Supp. at 284-85. *Accord, Weinberger v. Great Northern Nekoosa Corp.*, 801 F. Supp. 804, 825 n.59 (D. Me. 1992) ("The *Dague* court's policy rationales in denying a contingency-based multiplier seems to be equally applicable [to common funds].").

Dague proscribed the use of contingent risk multipliers to enhance the lodestar for the following reasons:

1. Enhancement for contingency risk "would likely duplicate . . . factors already subsumed in the lodestar." *Dague*, 505 U.S. at 562.

2. Enhancement for contingency risk "would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the 'reasonable fees' provisions." *Dague*, 505 U.S. at 563.

3. Enhancement for contingency risk to attempt "to mimic the intricacies of the fee-paying market in every respect [is neither necessary nor even possible]." *Dague*, 505 U.S. at 566-67.

4. Enhancement for contingency risk, under the conditions set forth in *Delaware Valley II* [*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, et al.*, 483 U.S. 711 (1987)], cannot "be intelligibly applied." *Dague*, 505 U.S. at 563.

5. Enhancement for contingency risk requires that a defendant "would in effect pay for the attorney's time (or anticipated time) in cases where his client does not prevail." *Dague*, 505 U.S. at 565.

6. Enhancement for contingency risk "would make the setting of fees more complex and arbitrary, hence more unpredictable. . . ." *Dague*, 505 U.S. at 566.

Class actions, by their nature, have a significantly greater potential to result in settlements irrespective of the merits of the case than any other form of litigation.

> First, the class certification turns a $200,000 dispute . . . into a $200 million dispute. Such a claim puts a bet-your-company decision to Bridgeport's managers and may induce a substantial settlement, *even if the customers' position is weak.*

Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 675 (7th Cir. 2001) (emphasis added).

As noted by Judge Posner in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995), class actions produce what have been described as "blackmail" settlements, i.e., settlements that rational business judgment requires defendants settle, "even if they have no legal liability."

> Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements."

Id. at 1298. *See also* George L. Priest, *Economics of Class Actions*, 9 KAN. J. L. & PUB. POL'Y 481, 482 (No. 3, Spring 2000):

> But, where damages are a substantial issue, the combination of the expansion of liability, the uncertainty of the process, and the way our class action procedures are devised, almost always leads to automatic settlement or guaranteed settlement once a class action is certified.

Furthermore, allowing two radically different fee outcomes, based upon whether class counsel seek attorneys' fees under a fee-shifting statute as opposed to seeking them from a common fund, has numerous additional deleterious effects.

1. It frustrates the intent of Congress. In establishing fee-shifting statutes, Congress sought to encourage lawyers to undertake specific types of litigation that it deemed to be socially beneficial. However, to pay lawyers more (indeed, nearly ten times their fees for identical work), when reasonable attorneys' fees are paid from a common fund as opposed to fees paid by a defendant under a fee-shifting provision, serves as a disincentive to lawyers to litigate what Congress believed were socially beneficial claims.

In point of fact, both the class action mechanism and fee-shifting provisions were instituted to encourage public interest litigation. If a court is asked to determine a reasonable fee, there is no justification of having a radically different fee enriching experience for lawyers where both types of litigation were enacted by Congress to serve the public good.

2. To fail to extend the *Dague* prohibition against risk multipliers to common fund recoveries compromises the lawyers' fiduciary responsibility to maximize the class's recovery and incentivizes counsel to place their own financial interests ahead of the interests of the class.

The conflict of interest issue in litigation commenced under fee-shifting statutes and settled with the creation of a common fund is clear:

> In a case such as this one, however, had plaintiffs prevailed at trial, it is entirely possible that defendants, rather than the common fund, would have been liable for attorney's fees under ERISA, 29 U.S.C.A. § 1132(g)(1). For the court to award plaintiffs' counsel a percentage of the settlement when he might only have been entitled to an hourly – and therefore possibly lower – fee had he obtained a favorable judgment, would raise the specter of a significant conflict of interest between counsel and the absent class members in the negotiation of such a settlement.

Bowen v. South Trust, 760 F. Supp. 889, 896 (M.D. Ala. 1991) (footnotes omitted).

See also Brytus v. Spang & Co., 203 F.3d 238 (3d Cir. 2000), regarding the problem of the disparity of different methods of calculating reasonable attorneys' fees under the aforementioned circumstance.

> Of course, there remains the possibility that in some cases counsel for a class of plaintiffs may receive a higher fee award upon settlement than they would have received had the case proceeded to judgment.

Id. at 247, and *McLendon v. The Continental Group, Inc., et al.*, 872 F. Supp. 142 (D.N.J. 1994):

> The Master[11] concludes that the *Dague* restriction must apply to any common fund case that started as a fee-shifting case. He reasons that since *Dague* clearly prohibits any risk enhancement of lodestar amounts in statutory fee cases, then allowing such enhancement in such cases that settle for a lump sum would improperly encourage plaintiff attorneys to settle for lump sums in hopes of obtaining a risk enhancement that would not otherwise be available. *Thus, the Master predicts that the Supreme Court would prohibit risk enhancement of the lodestar amount even if the award came from a common fund derived from a fee-shifting case.* . . . In essence, the Master contends that if different rules apply to attorneys' fees once a fee-shifting case settles, then a conflict of interest inevitably would arise between plaintiffs and their attorneys as to the course of the litigation.

Id. at 154 (footnote and citation omitted; emphasis added) (highlighting the controversy over these issues, Judge Sarokin overruled the Special Master's finding).

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[11] Referring to Special Master Yale Law School Professor George L. Priest.

This Court, in *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 621 (1997), noted the problem where class counsel were "confined to settlement negotiations [and] could not use the threat of litigation to press for a better settlement." In such circumstances, class counsel were compromised in their ability to represent the class's interest.

Class counsel should never be placed in the position of being able to engineer higher compensation for themselves by settling cases on terms which optimize their own recovery when all their thoughts should be directed towards maximizing the class's recovery. Society should not be placed in a position where its plaintiffs' bar receives a ten-times greater legal fee for settling a case of questionable merit than it receives for litigating a case to a successful determination on its merit. Allowing lawyers' self-interest to intrude into their obligation to maximize the class's recovery will only further weaken public confidence in the legal profession.

In the case at bar, the class action lawsuit was filed under the FLSA, which provides for an award of reasonable attorneys' fees similar to the provisions of the federal environmental statutes at issue in *Dague*. If this case had gone to trial and a verdict favorable to the plaintiffs were returned, *Dague* would control, and the fee awarded would be based on the lodestar, i.e., at least one-tenth of the fee awarded!

The Ninth Circuit's affirmance of the district court's 25 percent benchmark incorporates a contingent risk component:

> There are no special circumstances here which indicate that the 25% benchmark award is either too small or too large. . . . Class counsel . . . have the case on a contingency.

Torrisi v. Tucson Electric Power Co., et al., 8 F.3d 1370, 1376 (9th Cir. 1993), was based upon the Department of Labor's opinion letter. The district court was, in essence, saying that had the litigation continued, there was a high risk that the class would have gotten significantly less or nothing if settlement had not been reached prior to publication of the Department's opinion.

IV. Common Fund Principles Only Apply When Calculating a Reasonable Attorneys' Fee Paid from a Class Common Fund Recovery

Issue No. 2(a).

> If the answer to Issue No. 2 is yes, is it permissible to apply common fund principles when, as the instant settlement provides, (i) the attorneys' fee is not paid from a common fund but is paid separately by the defendant (as in fee shifting), and (ii) any court reduction in the requested attorneys' fee benefits the defendant, not class members (as in fee shifting)?

This class action settlement is symptomatic of a rapidly growing practice in federal courts throughout the nation in which plaintiffs' class counsel betray the interests of their clients to secure excessive fees for themselves. The scheme, as is currently being practiced, diverts hundreds of millions of dollars from plaintiffs' recoveries to class counsel or defendants. The essence of the scheme involves an accommodation with the defendants to manipulate the settlement structure to increase attorneys' fees and reduce defendant's distribution to class members *and* avoid this Court's decision in *Dague*.

The practice operates as follows: Plaintiffs' counsel file a class action lawsuit under a statute which provides for fee shifting – in the instant case the FLSA, 29 U.S.C. § 216(b). Plaintiffs' counsel seek to maximize their fee while defendants' counsel are obligated to minimize the cost of the settlement to their clients, so class counsel and the defendants agree to settle the case by negotiating the amount to be paid to the class, as well as a separate attorneys' fee payment by the defendants to the class attorneys. Class counsel nonetheless ask the court to approve their fee request under common fund principles. Seeking fees under the common fund doctrine allows plaintiffs' lawyers to do an end run around *Dague's* prohibition against contingent risk enhancement. The fee request is a percentage of the theoretical maximum payment by the defendant; but, since it is *not* paid from a common fund if the fee is reduced, even by the actions of a class member objecting, a fee reduction inures to the benefit of the defendant.

Although this practice mimics fee shifting and *Dague* should apply, the parties convince the court to do otherwise. As the district court's order notes:

> "Under the 'common fund' doctrine. . . ."[12] (App. 65).

When reasonable attorneys' fees are awarded in connection with a case brought under a fee-shifting statute and fees are paid separately by the defendants, fee-shifting principles are involved, not common fund principles.

> [A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee *from the fund as a whole*.

Boeing Co. v. Van Gemert, 444 U.S. at 478.

This scheme also creates the very problem that this Court sought to avoid in *Evans v. Jeff D.*, 475

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[12] It is, as a result of these kinds of rulings, that Professor John Coffee has observed:

> Yet, to some extent, the wool can be pulled over the court's eyes if the parties negotiate an agreement under which legal fees will be paid separately by the defendant.

John C. Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation,* Law & Contemp. Probl., 48 DUKE L. J. 3 (Summer 1985), at 71 n.102.

U.S. 717 (1986). The settling defendant can no longer place on the table the maximum amount of money available to settle the litigation because attorneys' fees do not come out of the total settlement payment. Rather, a defendant who has no interest in how settlement funds are allocated between class counsel and the class is required to negotiate just such an allocation. One need not be a cynic to assume that the defendant will make that allocation in a manner that assures that class counsel's fee demand will be satisfied in order to ensure litigation peace.

V. Neither an Upward Percentage Adjustment nor an Enhancement of the Lodestar Can Be Based on the Fact that the Lawsuit's Claims Appeared to Be without Merit

Issue No. 3.

If the answers to Issue Nos. 2 and 2(a) are yes, can a court apply the "exceptional result/superior performance" factors to support an upward adjustment of the fee percentage, or a positive enhancement of the lodestar in a cross-check, based upon a finding that the class's claim was of questionable merit? (Petitioner believes this issue is currently pending before this Court in *Kenny A. v. Perdue, et al.*, 532 F.3d 1209 (11th Cir. 2008), *cert. granted*, 129 S.Ct. 1907, 2009 LEXIS 2664, 77 U.S.L.W. 3557 (Apr. 6, 2009) (No. 08-970) [hereinafter *Perdue*].)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, v. UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation, Defendants-Appellees, v. ANTHONY D'ARIA, Plaintiff-intervenor-Appellant.	No. 07-15278 D.C. No. CV-06-04068-MMC MEMORANDUM* (Filed May 14, 2009)

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated, Plaintiffs, and MARTY EVANS, Plaintiff-Appellant, v. UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation, Defendants-Appellees, v. ANTHONY D'ARIA, Plaintiff-intervenor.	No. 07-15309 D.C. No. CV-06-04068-MMC

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted January 14, 2009
San Francisco, California

Before: FARRIS, NOONAN and McKEOWN, Circuit Judges.

This dispute arises from the district court's approval of a class action settlement between the named plaintiffs and the defendant, UBS Financial Services. On appeal, plaintiff-objector Marty Evans raises several objections to the district court's determination that the settlement was fair, reasonable, and adequate as required by Fed. R. Civ. P. 23(e). Appellant Anthony D'Aria objects to the district court's denial of his motion to intervene in the case on the grounds that it was untimely. The parties are familiar with the facts.

I. Pending motions

We grant UBS's motion to strike documents from D'Aria's excerpts of record which were submitted to the district court after the final approval of the settlement. *See Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077-78 (9th Cir. 1988). We also grant UBS's motion for judicial notice of the *Bowman* declaration.

II. Evans's Claims

Evans argues, on several grounds, that the district court abused its discretion in determining that the settlement was fundamentally "fair, reasonable, and adequate," as required by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23(e). "The district court's decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions, and proof." *In re Mego Financial Corp. Securities Litigation,* 213 F.3d 454, 458 (9th Cir. 2000) (internal citations omitted). Each of Evans' arguments is addressed below.

First, Evans argues that because the named plaintiffs are all former employees of defendants, they cannot fairly and adequately represent a class that includes both current and former UBS employees. ER 474. A class action may be maintained only if "the representative parties will fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4). The present settlement aims to provide compensation for unlawful practices occurring during the class period. For that period, "both the former and current employees are equally interested in obtaining compensation for the assertedly unlawful practices set forth in the complaint." ER 475.[1] Therefore, the district court did not abuse its discretion in finding that the class-representatives adequately represented the interests of the class. *See Cummings v. Connell,* 316 F.3d 886, 896 (9th Cir. 2003) ("this circuit does not favor denial of class certification on the basis of speculative conflicts").

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[1] As the district court noted, the settlement does not preclude any class member from filing suit against UBS for violation of the law occurring outside of the class period. ER 475.

Second, Evans argues that the court violated the rights of class members from states other than New York, Pennsylvania, and New Jersey by approving a plan of allocation that distributes a greater proportion of the settlement funds to class members in those states. ER 63. The Special Master and the district court found that the parties had set forth a reasoned basis for treating claimants employed in these three states differently from claimants in other jurisdictions. ER 479; *see also,* JSER 197 (Special Master's report concluding that the disproportionate allocation was justified by differences among the states regarding "the definition of employees; the definition of wages; various exemptions; varieties of allowed or disallowed deductions from employee compensation; elements of the causes of action available in various states; and variances in the recoveries of the debt, interest, attorneys' fees, costs and penalties"). On appeal, Evans does not address the substance of the parties' or the court's reasoning, nor does he address the differences in law between the states at issue. Moreover, the fact that one of the named plaintiffs was a class member from a state other than New York, New Jersey, and Pennsylvania, undermines Evans's allegations of inadequate representation. ER 461, n. 1. Therefore, the district court did not abuse its discretion in rejecting Evans's objection to the plan of allocation.

Third, Evans argues that the district court erred in appointing a Special Master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, without first obtaining consent from Evans. ER 476; Fed. R. Civ. P. 53. Rule 53(a) permits the appointment of a Special Master for, among other things, the "perform[ance of] duties consented to by the parties," or without consent when appointment is warranted by "the need to perform an accounting or resolve a difficult computation of damages." *See* Fed. R. Civ. P. 53(a)(1)(A)-(C). In this case the named plaintiffs representing the class and the defendant together requested the appointment of the Master to address the parties' damages analysis. This is sufficient to justify the appointment of a special Master.

Fourth, Evans challenges a provision in the settlement stating that any reduction in attorneys' fees by the court will revert to the defendant, rather than to the class. ER 63-64. We agree that the reversion clause, as pertaining to attorneys' fees, is problematic because it acts as a device to isolate fees from scrutiny. *See Staton v. Boeing Co.,* 327 F.3d 938, 964-965, 970-71 (9th Cir. 2003).[2] In addition to being

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[2] While clauses mandating the reversion of unclaimed funds may be common, appellees cite to no cases approving a settlement with a reversion clause for attorneys' fees. *See* UBS Brief at 101-02. In fact, the Ninth Circuit in *Staton* stated that ordinarily, "after the court determines the reasonable amount of attorneys' fees, all the remaining value of the fund belongs to the class rather than reverting to the defendant." 327 F.3d at 971. A reversion clause for attorneys' fees is problematic because it removes an important economic incentive that class members may have in challenging a fee award that may be excessive under the circumstances. The clause also gives the district court one less reason to challenge an award of attorneys' fees where

(Continued on following page)

favorable to class counsel, the reversion clause is favorable to UBS, which will receive the ultimate benefit of any reduction by the court. Because the reversion clause creates incentives for the negotiating parties to make the attorneys' fees a larger percentage of the total recovery, the district court is required to "ensure that the class members' interest were not compromised in favor of those of class counsel." *See Staton,* 327 F.3d at 964-65.

Here, the district court found that the class members obtained exceptional results for the class. ER 483-84. Notably, the class representatives were able to negotiate the settlement before the Department of Labor issued an Opinion Letter that would have reduced the value of plaintiffs' claims. *See* ER 465; 483-84. The court also acknowledged evidence of additional value in the settlement in the form of forward-looking relief. *See* ER 475, n.7; JSER 114-15. The fact that class counsel achieved such timely results for the class suggest that the class's interests were not compromised by the reversion clause, and that the district court did not abuse its discretion in finding that the settlement was fair and adequate.

Finally, Evans argues that the court's approval of an attorneys' fees award consisting of 25% of the total

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any reduction would only benefit the defendant, who may have all but admitted to significant violations of the law. *See Staton,* 327 F.3d at 970 (rejecting a condition that would "inhibit district courts from engaging in independent determinations of reasonable fees").

award constitutes an abuse of discretion. While we agree that the court's award of attorneys' fees is high relative to the total class recovery, the question on appeal "is not whether the district court should have applied some other percentage, but whether in arriving at its percentage it *considered all the circumstances of the case* and reached a *reasonable* percentage." *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1048 (9th Cir. 2002) (emphasis added). In reviewing the award of attorneys' fees, the district court properly performed an informal lodestar cross-check, and noted the relatively low time-commitment by plaintiff's counsel. *See* Hearing Transcript of January 19, 2007 (Dkt. 238); ER 483; *Six Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir. 1990) (suggesting a lodestar cross-check and adjustment in special circumstances when "the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors"). Having acknowledged that the lodestar factors weigh against a substantial award, the district court did not abuse its discretion in giving weight to other factors, such as the results achieved for the class and the favorable timing of the settlement. *See Vizcaino,* 290 F.3d at 1047-50. Under these circumstances, the court's ultimate award of 25% was not unreasonable. *See Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1029 (9th Cir. 1998) (referring to 25% in attorneys' fees as a "benchmark award"). Further, the court's calculation of 25% of the total award, rather than 25% of the amount actually collected by the class, was proper, and was in line with Ninth circuit precedent. *See id.* (discussing awards of 25% of *the common fund* as benchmark figure).

Evans also argues that the district court abused its discretion in using the percent-of-recovery approach (rather than the lodestar multiplier approach) in calculating attorneys' fees. However, "[i]n 'common-fund' cases where the settlement or award creates a large fund for distribution to the class, the district court has discretion to use either a percentage or lodestar method." *Hanlon,* 150 F.3d at 1029 (internal citations omitted). Similarly, Evans' contention that the district court erred in using common fund principles in assessing the award of attorneys' fees is inconsistent with Ninth Circuit jurisprudence, which permits the application of common fund principles where – as in the present case – the class of beneficiaries is identifiable and the benefits can be traced in order to allocate the fees to the class. *See Petition of Hill,* 775 F.2d 1037, 1041 (9th Cir. 1985) (citing *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 265 n.39 (1975)).

Therefore, the district court did not abuse its discretion in approving the settlement, including the award of attorneys' fees, as fair, reasonable, and adequate.

III. D'Aria's Claim

In order to challenge the fairness of the settlement or the reasonableness of class counsel's fees, D'Aria must either submit a timely objection to the settlement or be granted leave to intervene. D'Aria failed to submit a timely objection to the settlement. One month after the deadline to opt out of the settlement, D'Aria sought to intervene in the suit as a matter of right, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 24(a); ER 448. The district court properly denied D'Aria's motion to intervene as of right because D'Aria's motion was untimely. *See* ER 451-454.

The district court's decision is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, v. UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation, Defendants-Appellees, v. ANTHONY D'ARIA, Plaintiff-intervenor-Appellant.	No. 07-15278 D.C. No. CV-06-04068-MMC Northern District of California, San Francisco ORDER (Filed May 14, 2009)

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs,

and

MARTY EVANS,

Plaintiff-Appellant,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants-Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor.

No. 07-15309

D.C. No.
CV-06-04068-MMC
Northern District
of California,
San Francisco

Before: FARRIS, NOONAN and McKEOWN, Circuit Judges.

The memorandum filed on February 9, 2009 is hereby withdrawn.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, v. UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation, Defendants-Appellees, v. ANTHONY D'ARIA, Plaintiff-intervenor-Appellant.	No. 07-15278 D.C. No. CV-06-04068-MMC MEMORANDUM* (Filed Feb. 9, 2009)

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated, Plaintiffs, and MARTY EVANS, Plaintiff-Appellant, v. UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation, Defendants-Appellees, v. ANTHONY D'ARIA, Plaintiff-intervenor.	No. 07-15309 D.C. No. CV-06-04068-MMC

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted January 14, 2009
San Francisco, California

Before: FARRIS, NOONAN and McKEOWN, Circuit Judges.

This dispute arises from the district court's approval of a class action settlement between the named plaintiffs and the defendant, UBS Financial Services. On appeal, plaintiff-objector Marty Evans raises several objections to the district court's determination that the settlement was fair, reasonable, and adequate as required by Fed. R. Civ. P. 23(e). Appellant Anthony D'Aria objects to the district court's denial of his motion to intervene in the case on the grounds that it was untimely. The parties are familiar with the facts.

I. Pending motions

We grant UBS's motion to strike documents from D'Aria's excerpts of record which were submitted to the district court after the final approval of the settlement. *See Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077-78 (9th Cir. 1988). We also grant UBS's motion for judicial notice of the *Bowman* declaration.

II. Evans's Claims

Evans argues, on several grounds, that the district court abused its discretion in determining that the settlement was fundamentally "fair, reasonable, and adequate," as required by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23(e). "The district court's decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions, and proof." *In re Mego Financial Corp. Securities Litigation,* 213 F.3d 454, 458 (9th Cir. 2000) (internal citations omitted). Each of Evans' arguments is addressed below.

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One month after the deadline to opt out of the settlement, D'Aria sought to intervene in the suit as a matter of right, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 24(a); ER 448. The district court properly denied D'Aria's motion to intervene as of right because D'Aria's motion was untimely. *See* ER 451-454.

The district court's decision is AFFIRMED.

(*Counsel of Record are Listed on Next Page*)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated, Plaintiffs, vs. UBS FINANCIAL SERVICES INC., and DOES 1 through 50, inclusive, Defendants.	CASE NO. C-06-4068 MMC **ORDER GRANTING JOINT MOTION FOR FINAL APPROVAL; JUDGMENT** (Filed Jan. 26, 2007) Date: January 19, 2007 Time: 9:00 a.m. Place: Courtroom 7, 19th Floor Judge: Hon. Maxine M. Chesney

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Attorneys for Defendant
UBS FINANCIAL SERVICES INC.

On January 19, 2007 at 9:00 a.m., the Court heard the joint motion by defendant UBS Financial Services Inc. ("UBS") and plaintiffs Joseph Glass, Dante DiFrancesco, Ralph Carbone, and David Bachrach ("Plaintiffs") for final approval of the proposed class action settlement in the instant action. After reviewing the parties' written submissions, and after hearing arguments of counsel, the Court finds and orders as follows:

1. All terms used in this order ("Final Order") shall have the same meaning as defined in the

Parties' "Amended Joint Stipulation of Settlement And Release Between Plaintiffs Joseph Glass, Dante DiFrancesco, Ralph Carbone, and David Bachrach and Defendant UBS Financial Services Inc." ("Settlement"), a copy of which is attached hereto as **Exhibit A**.

2. This Court has jurisdiction over the subject matter of the Instant action and over all parties, including all Class Members.

3. Pursuant to the Court's "Order Granting Preliminary Approval Of Settlement And Setting Final Approval Hearing" dated August 25, 2006 ("Preliminary Approval Order"), the Court preliminarily certified the following class for settlement purposes (the "Class"):

> **ALL CURRENT AND FORMER EMPLOYEES OF UBS FINANCIAL SERVICES INC. ("UBS") WHO WERE EMPLOYED BY UBS OUTSIDE THE STATE OF CALIFORNIA AS FINANCIAL ADVISORS AND/OR NEW FINANCIAL ADVISORS OR FINANCIAL ADVISOR TRAINEES DURING ALL OR PART OF THE APPLICABLE PERIOD FOR THE STATE OR TERRITORY IN WHICH THEY WERE EMPLOYED BY UBS, AS SET FORTH IN EXHIBIT E TO THE AMENDED JOINT STIPULATION OF SETTLEMENT AND THE NOTICE OF PENDENCY OF CLASS ACTION.**

The Class is now finally and conclusively certified for settlement purposes.

4. In accordance with the Preliminary Order, the parties caused to be mailed the following: (1) Notice of Pendency of Class Action And Opportunity to Opt In, Proposed Settlement And Hearing Date For Court Approval; (2) Consent to Join Settlement Form; (3) Claim Form; and (4) Exclusion Form (collectively the "Notice Materials"). The Notice Materials were sent via first class mail within the time mandated in the Preliminary Approval Order, and adequately informed the Class of: (1) the pendency of the proposed Settlement; (2) all material elements of the proposed Settlement; (3) the January 19, 2007 hearing date for final approval of the Settlement; and (4) the opportunity to be excluded from the proposed Class or otherwise object to the proposed Settlement. David C. Holland of Rust Consulting, Inc., the Claims Administrator, filed a declaration with the Court on January 5, 2007, concerning the dissemination of the Notice Materials and the status of claims and objections.

5. The Notice Materials provided due and adequate notice to Class Members and constitute the best notice practicable and possible under the circumstances. The proof of dissemination filed with the Court demonstrates that this Court's orders have been complied with in regard to the Notice Materials and preliminary approval of the Settlement, and further, that the best notice practicable and possible under the circumstances was in fact given and constituted valid, due, and sufficient notice to members

of the Class, complying fully with all applicable statutes and laws.

6. In accordance with Class Action Fairness Act requirements, the parties caused to be mailed a copy of the Notice Materials and a complete list of the Class Members to the Attorneys General in each of the 50 jurisdictions encompassed by the Settlement.

7. The Attorney General of New York filed a Motion to Appear As *Amicus Curiae* To Comment on the Proposed Class Action. The Court granted the motion.

8. Eight Class Members and the Attorney General of the State of New York have objected to the Settlement. The Court rejects these objections.

9. Additionally, Class Member Lawrence R. Kaufmann, filed a Motion to Intervene in the Instant action through his attorney Lovell Stewart Halebian, LLP, which motion contained objections to the settlement. Kaufmann withdrew his motion, and the Court permitted Kaufmann to withdraw the objections contained therein. The Court further denied the motion of Anthony D'Aria to substitute for Lawrence R. Kaufmann as an objector and/or intervenor. The Court also denied Anthony D'Aria's motion to intervene.

10. The Court finds that the Settlement was the product of arms-length negotiations between experienced counsel, assisted by a respected mediator. The Court finds that the Settlement is fair, reasonable,

and adequate, and hereby grants final approval to the Settlement. In so doing, the Court has thoroughly considered such factors as: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; and the reaction of the Class Members to the proposed Settlement. *See Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026 (9th Cir. 1998). Plaintiffs and Defendant are ordered to carry out the terms of the Settlement.

11. Defendant shall pay the claims presented by the claim procedure described in the Settlement. Defendant shall have no further liability for costs, expenses, interest, attorneys' fees, or for any other charge, expense, or liability, except as provided in the Settlement.

12. The Class is bound by the release and waiver listed in Paragraphs 48 and 49 of the Settlement, respectively, and this Final Order, which Final Order shall have the force and effect of *res judicata* as to them.

13. The class representatives, Joseph Glass, Dante DiFrancesco, Ralph Carbone, and David Bachrach, are bound by the release and waiver listed in Paragraphs 50 and 51 of the Settlement, respectively, and this Final Order, which Final Order shall have the force and effect of *res judicata* as to them.

14. The Settlement is not an admission by UBS nor is this Final Order a finding of the validity of any claims in the Instant action or any wrongdoing by UBS. In addition, the Settlement is not an admission nor is this Final Order a finding that the certification of the Class is proper for any purpose or proceeding other than for settlement purposes in the present case. Furthermore, neither the Settlement, nor any document, statement, proceeding or conduct related to the settlement or the Settlement, nor any reports or accounting of those matters, will be (i) construed as, offered or admitted in evidence as, received as, or deemed to be evidence for any purpose adverse to UBS, including, but not limited to, evidence of a presumption, concession, indication or admission by UBS of any liability, fault, wrongdoing, omission, concession or damage; or (ii) disclosed, referred to or offered in evidence against UBS, in any further proceeding in the instant action, or any other civil, criminal or administrative action or proceeding except for purposes of effectuating the Settlement. However, the Settlement may be admitted in evidence and otherwise used in any and all proceedings to enforce any or all terms of the Settlement, or in defense of any claims released or barred by the Settlement.

15. The claims alleged in the Complaint are hereby dismissed with prejudice, provided, however, and without affecting the finality of this Final Order in any way, this Court retains continuing jurisdiction over the interpretation, implementation, administration and enforcement of the terms of the Settlement.

16. This Final Order is deemed final entry of judgment as defined by Federal Rule of Civil Procedure 58(a)(1).

IT IS SO ORDERED.

DATED: January 26, 2007 /s/ Maxine M. Chesney

HONORABLE
MAXINE M. CHESNEY
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

JOSEPH GLASS, et al., Plaintiffs, v. UBS FINANCIAL SERVICES, INC., et al., Defendants.	No. C-06-4068 MMC **ORDER (1) GRANTING JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT; (2) GRANTING CLASS COUNSEL'S APPLICATION FOR ATTORNEY'S FEES, COSTS AND CLASS REPRESENTATIVE ENHANCEMENTS** (Filed Jan. 26, 2007) (Docket Nos. 183, 185)

Before the Court are two motions filed January 5, 2007: (1) the parties' joint motion for final approval of settlement; and (2) class counsel's application for attorney's fees, costs, and class representative enhancements. On January 19, 2006, the Court held a fairness hearing. Having considered the papers filed in support of the motions, and the arguments of counsel for the parties and for objector Marty Evans at the fairness hearing, the Court rules as follows.

BACKGROUND

The instant class action is asserted on behalf of a class consisting of all persons who, at any time during the applicable statute of limitations, are or were employed as stockbrokers at any of the brokerage offices of UBS Financial Services Inc. or its predecessors, UBS Paine Webber and Paine Webber Group Inc., anywhere in the United States or its territories, excluding California. (See Compl. ¶ 1.) Plaintiffs Joseph Glass, Dante DiFrancesco, Ralph Carbone, and David Bachrach allege that they worked as stockbrokers for defendant UBS Financial Services, Inc. and/or its predecessors UBS Paine Webber and Paine Webber Group, Inc. (*See id.* ¶¶ 7-10.) The first four causes of action are for failure to pay overtime wages in violation of the federal Fair Labor Standards Act, and New Jersey, New York, and Connecticut law.[1] (*See id.* ¶¶ 27-55.) The fifth, sixth, and seventh causes of action are for improper deductions from wages in violation of New Jersey, New York, and Connecticut Law. (*See id.* ¶¶ 56-70.)

The action was settled on January 31, 2006 during a mediation conducted by David Rotman, who, defense counsel attests, is "one of the preeminent mediators of employment law claims in the country." (*See* Wilcox Decl. ¶ 3.) On July 28, 2006, the parties filed a joint motion for preliminary approval of the proposed settlement. The amended joint stipulation of settlement provides for a maximum payment of $45,000,000 to a class consisting of "all persons who work or worked for UBS in the Covered Positions during the Covered Period in the United States including United States territories, and excluding the state of California." (*See* Amended Joint Stipulation of Settlement ¶¶ 5, 29(a).) "UBS" is defined to include "UBS Financial Services, Inc. and all of its officers, directors, agents, attorneys, parents, predecessors (including UBS Paine Webber and Paine Webber Group Inc.), successors, subsidiaries, and related and affiliated entities, including UBS International, Inc." (*See id.* ¶ 2.) The "covered positions" are defined as "job codes 226 and 008226, Unregistered Trainee; job codes 456 and 008456, Broker; and job codes 457 and 008457, Registered Trainee at UBS." (*See id.* ¶ 14.) The "covered period" varies depending on "the applicable statute of limitations period for the jurisdiction in which the Class Member was employed." (*See id.* ¶ 13 and Ex. E.)

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[1] Glass and Bachrach allege they worked for defendants in New Jersey. (*See* Compl. ¶¶ 7, 10.) DiFrancesco alleges he worked for defendants in New York. (*See id.* ¶ 8.) Carbone alleges he worked for defendants in Connecticut. (*See id.* at 9.)

The proposed settlement further provides that of the $45,000,000 settlement amount, the following amounts will be deducted, subject to court approval: (1) attorney's fees and litigation costs in an amount up to $11,250,000; (2) "enhancements" to the four named class representatives, in an amount up to $100,000 ($25,000 each); and (3) a "reasonable amount" to the Claims Administrator to administer the settlement. (*See id.* ¶ 29(a).) The settlement provides that all unclaimed funds will revert to UBS, as well as any portion of the maximum $11,500,000 in attorney's fees and $100,000 in enhancements that is not awarded by the Court. (*See id.* ¶¶ 29(b), 30-31.)

Each class member who participates in the settlement will receive a fixed payment from the settlement fund based on the number of months or partial months he or she worked in a covered position for the period between the commencement of the applicable statute of limitations for the state or territory in which that class member worked for UBS and the date of preliminary approval. (*See id.* ¶ 32(c).) The Class Notice provides that class members who worked in New York, New Jersey, or Pennsylvania will receive $120.00 for each full or partial month worked during the class period, while class members who worked in other states will receive $75.00 for each full or partial month worked during the class period.[2] (*See* Class Notice at 3 ¶ C.)

On August 25, 2006, the Court granted preliminary approval of the settlement and set a fairness hearing for January 19, 2007. Pursuant to the Class

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[2] According to the settlement, "The formula developed by the parties allocates a greater proportion of the settlement funds to class members in New York, New Jersey, and Pennsylvania than to class members in other jurisdictions because the law and litigation activity regarding wage deductions in other jurisdictions likely would have caused the parties to devote disproportionate resources to the litigation with uncertain results." (*See id.* ¶ 29(b).)

Notice, any objections to the settlement were required to be mailed on or before November 14, 2006. (*See* Class Notice at 7 ¶ C.)

The Court received objections to the settlement from the following class members: (1) Clinton E. Anderson ("Anderson"), dated September 20, 2006; (2) Norman Demetrios Pappous ("Pappous"), dated September 20, 2006; (3) Steven D. Arkwright ("Arkwright"), dated September 21, 2006; (4) Jason Cintron ("Cintron"), dated September 26, 2006; (5) Geoffrey Earl Wilwerding ("Wilwerding"), dated October 18, 2006; (6) Christopher C. Gabriel ("Gabriel"), dated November 7, 2006; (7) Marty Evans ("Evans"), dated November 14, 2006; and (8) Shrenik Bavishi ("Bavishi"), dated November 14, 2006. Evans also filed supplemental objections, dated December 21, 2006, relating to the Court's appointment of a special master. In addition, the Court, on January 8, 2007, granted the motion of the Attorney General of the State of New York ("New York Attorney General") to appear as amicus curiae, and the New York Attorney General has filed an amicus brief raising its concerns about the settlement.

Additionally, class member Lawrence R. Kaufmann ("Kaufmann") filed a motion to intervene, which motion contained objections to the settlement. Kaufmann subsequently withdrew the motion. By orders filed November 16, 2006 and January 17, 2007, the Court permitted Kaufmann to withdraw, respectively, both his motion to intervene and his objections to the proposed settlement. After Kaufmann withdrew his motion to intervene, class member Anthony D'Aria filed a motion to adopt Kaufmann's objections and a motion to intervene in the action. By orders filed November 16, 2006 and January 17, 2007, respectively, the Court denied D'Aria's motions.

On December 7, 2006, pursuant to the joint motion of the parties, the Court appointed the Honorable Charles A. Legge (hereafter "Judge Legge") as a special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, "to review issues or questions . . . relative to the allocation among different states of the settlement proceeds" and to "determine whether the allocation formula in the settlement is fair, reasonable and adequate in light of any timely challenges to that allocation." (*See* Order Appointing the Honorable Charles Legge as Master Pursuant to the Stipulation of the Parties ("Stipulated Appointment Order"), filed Dec. 7, 2006, at 2-3.) Pursuant to such authority, Judge Legge held a hearing on the matter on January 4, 2007, and, on January 12, 2007, filed a "Report, Findings and Recommendations of the Master."

LEGAL STANDARD

The Court may approve a class action settlement "only after a hearing and on finding that the settlement . . . is fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(1)(C). "Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

"It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Id.* "The settlement must stand or fall in its entirety." *Id.* The Court may not delete, modify, or rewrite particular provisions of the settlement. *See id.* "Settlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion." *See id.*

DISCUSSION

A. Joint Motion for Final Approval

1. Strength of case

The Court is aware of no controlling federal or state authority on the issue of whether stockbrokers are entitled to overtime pay. As set forth below, the legal uncertainty at the time of settlement with respect to whether stockbrokers are entitled to overtime under federal and state law thus favors settlement of the instant action.

The FLSA contains various exemptions from its requirement that employers pay their employees time and a half for work in excess of 40 hours per week, including, in particular, an exemption for "any employee employed in a bona fide . . . administrative . . . capacity." *See In re Farmers Insurance Exchange,* 466 F.3d 853, 858-59 (9th Cir. 2006); *see also* 29 U.S.C. § 213(a)(1). After the instant settlement was negotiated, one federal district court held the question of whether the stockbroker plaintiffs therein had performed work qualifying for such "administrative exemption" presented a triable issue of material fact that precluded summary judgment. *See Takacs v. A.G. Edwards and Sons, Inc.,* 444 F. Supp. 2d 1100, 1110-13 (S.D. Cal. 2006). Thereafter, on November 27, 2006, the Department of Labor issued an Opinion Letter stating that stockbrokers, to the extent they perform certain duties, meet the requirements of the administrative exemption and, thus, are not entitled to overtime under the FLSA. (*See* Wilcox Decl. Ex. I at 8.) Although not binding authority, courts "must give deference to the DOL's interpretation of its own regulations through, for example, Opinion Letters." *See Farmers,* 466 F.3d at 860. No court to date has determined the appropriate amount of deference to be afforded the November 27, 2006 Opinion Letter. As the parties note, "[t]he bottom line is that the law in this area is sparse and the outcome of any litigation was far from clear, for either UBS or the Plaintiffs."

Accordingly, this factor supports approval of the settlement.

2. The risk, expense, complexity, and likely duration of further litigation

In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. "The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." *See In re Mego Financial Corp. Securities Litigation,* 213 F.3d 454, 458 (9th Cir. 2000). Here, the risk of further litigation is substantial.

Accordingly, this factor supports approval of the settlement.

3. The risk of maintaining class action status throughout the trial

As the parties observe, the proposed settlement "accords every Covered Employee in every state the right to participate in the claim procedure without regard to factual and legal idiosyncrasies in their claims." (*See* Motion at 9:4-5.) Because the instant class covers employees who worked in every state other than California, the Court agrees with the parties that "[g]iven the diverse law that surrounds overtime eligibility and wage deductions across the country," it was by no means certain that plaintiffs would have been able to obtain certification of the wall-to-wall class that UBS is willing to accept for settlement purposes." (*See* Motion at 9:5-8.)

Accordingly, this factor supports approval of the settlement.

4. The amount offered in settlement

In determining whether the amount offered in settlement is fair, the Ninth Circuit has suggested that the Court compare the settlement amount to the parties' "estimates of the maximum amount of damages recoverable in a successful litigation." *See In re Mego Financial Corp. Securities Litigation,* 213 F.3d at 459. "[A] cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," however. *See id.*

Here, the parties represented to the Court at the preliminary approval hearing that the amount of the settlement constituted approximately 25 to 35% of the amount of damages plaintiffs could have hoped to prove at trial. (*See* New York Attorney General Decl. Ex. 1 (Transcript of Aug. 11, 2006 preliminary approval hearing) at 13:1-14:5.) The parties provided support for that calculation at the January 19, 2007 final fairness hearing. The Court finds a settlement based on such percentage reasonable in light of the uncertainties involved in the litigation.

Accordingly, this factor supports approval of the settlement.

5. The extent of discovery completed and the stage of the proceedings

Here, no formal discovery took place prior to settlement. As the Ninth Circuit has observed, however, "[i]n the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." *See In re Mego Financial Corp. Securities Litigation,* 213 F.3d at 459. In that regard, plaintiffs state that prior to mediation, plaintiffs' counsel "receiv[ed] informal discovery relating to the types and amounts of deductions taken by UBS, the months worked, and the salaries of UBS financial advisors," as well as "the benefit of information and documents given to [counsel] by [ ] many current and former UBS brokers." (*See* McInerney Decl. ¶ 13.) In addition, plaintiffs' counsel attests, he "deposed a consultant for UBS regarding the methodology of gathering the data that was provided at the mediation" and "received absolutely no indication that any of the material provided by UBS was incorrect." (*See id.* ¶ 16.)

Accordingly, this factor supports approval of the settlement.

6. The experience and views of counsel

The settlement was negotiated and approved by experienced counsel on both sides of the litigation, with the assistance of a well-respected mediator with substantial experience in employment litigation. Accordingly, this factor supports approval of the settlement.

7. The presence of a governmental participant

One of the factors the Court may consider in evaluating the fairness of a settlement is "the presence of a governmental participant." *See Hanlon v. Chrysler Corp.*, 150 F.3d at 1026. The participation of a governmental entity "serves to protect the interest of the class members." *See Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977). There is no indication that any governmental entity participated in the settlement of the instant action.

Accordingly, this factor favors neither approval nor disapproval of the settlement.

8. The reaction of the class members to the proposed settlement

On September 15, 2006, notice of the settlement was mailed to 13,176 class members. (*See* Holland Decl. ¶ 6.) As of January 4, 2007, the parties had received 6684 claim forms, representing approximately 51% of the total class members. (*See id.* ¶ 11.) The claim forms submitted seek compensation for a total of 241,609 qualified full or partial months worked during the class period, representing approximately 63% of a total of 386,271 qualified full or partial months worked by the class during the class period. (*See id.* 11.) The claims submitted seek payment of approximately $21,133,928 from the settlement fund. (*See id.*)

As of January 4, 2007, class members had submitted 280 requests to opt out of the settlement, representing an opt-out rate of approximately two percent. (*See id.* ¶¶ 16-18.) As noted above, timely objections to the settlement were submitted by eight class members and, as amicus, the New York Attorney General.

a. Objections by New York Attorney General

The objections of the New York Attorney General fall into three general categories. First, the New York Attorney General contends the settlement is unfair to New York class members because the recovery for each New York class member is less than the amount each California class member received in the settlement of the related action, *Bowman v. UBS,* C-04-3525. Second, the New York Attorney General objects to the requested attorney's fee award as excessive. Third, the New York Attorney General contends that the attorney's fee award provision of the settlement is contrary to Ninth Circuit authority as set forth in *Staton v. Boeing,* 327 F.3d 938 (9th Cir. 2003) and, as such, requires rejection of the settlement. The Court will address the New York Attorney General's substantive objections below, and will address its objections to the amount of fees sought in connection with class counsel's application for attorneys' fees.

i. Comparison to *Bowman* Settlement

The *Bowman* action, although addressing issues similar to those raised by the instant action, was an entirely separate and distinct case. In *Bowman*, a class of California stockbrokers, represented by different counsel than those representing the *Glass* plaintiffs, asserted claims under the FLSA and California law for unpaid overtime and improper wage deductions. *Bowman* was settled before any of the three cases ultimately consolidated as the *Glass* action was filed.

Because *Bowman* and *Glass* are separate actions that were separately litigated and separately settled, any direct comparison of the *Bowman* and *Glass* settlements is unwarranted. Indeed, even if the two actions were otherwise indistinguishable, a settlement for a lesser amount nonetheless may constitute a fair, reasonable, and adequate compromise of the dispute. Settlements by their very nature are not intended to provide full compensation for the claimed losses and consequently cannot be calculated with the same precision as actual damages. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005) (noting existence of "range of reasonableness" with respect to any settlement).

Moreover, defendants have submitted a response to the New York Attorney General's amicus brief, setting forth in detail the reasons for their belief that their defenses to plaintiffs' claims are stronger under New York law than under California law and, accordingly, why defendants were willing to settle the California claims for a higher amount per class member. In response, the New York Attorney General now concedes there is a "major difference" between New York and California overtime laws and, in particular, that "it is significantly easier to meet the FLSA (and New York) administrative exemption, greatly increasing the risk that New York as compared with California brokers would be found exempt from overtime law." (*See* New York Attorney General's Reply at 3:1-4.) Additionally, the New York Attorney General now acknowledges that "longer working hours in California . . . might explain a portion of the greater monetary recovery available in the *Bowman* settlement." (*See id.* at 4:12-13.) Although the New York Attorney General continues to take issue with defendants' arguments that California law on the wage deduction claims and availability of penalties is more favorable to plaintiffs than New York law, the Court finds the undisputed differences between California law and New York law with respect to the overtime claims suffices to justify the differences between the *Bowman* and *Glass* settlements.

Accordingly, the Court finds the differences between the *Bowman* and *Glass* settlements do not warrant rejection of the instant settlement.

ii. Attorney's Fees

As noted above, the New York Attorney General's objections to the amount of attorney's fees sought will be addressed below in connection with class counsel's motion for attorneys' fees.

iii. *Staton v. Boeing*

The New York Attorney General argues that the Ninth Circuit's opinion in *Staton v. Boeing* requires rejection of the proposed settlement. In particular, the New York Attorney General reads that decision to hold a settlement that provides for class counsel's seeking a specified percentage of a common fund, with a reversion to the defendant of any portion of the requested amount not granted by the court, "'allows too much leeway for lawyers representing a class to spurn a fair, adequate and reasonable settlement for their client in favor of inflated attorney's fees.'" (*See* Amicus Brief at 17:11-15 (quoting *Staton,* 327 F.3d at 969-70).

The language from *Staton* on which the New York Attorney General relies does not stand for the broad proposition asserted by the New York Attorney General. In *Staton,* the settlement therein at issue provided for an award of a fixed amount of attorneys' fees, which fees were not subject to court review. *See Staton,* 327 F.3d at 944-45; *see also id.* at 969 ("The parties negotiated the amount of attorneys' fees awarded as a term of the settlement agreement and thus conditioned the merits settlement upon judicial approval of the agreed-upon fees."). The Ninth Circuit found the lack of any provision for judicial review of the fees created a risk that class counsel would "spurn a fair, adequate and reasonable settlement for their clients in favor of inflated attorneys' fees," and held that "in order to obtain fees justified on a common fund basis, the class's lawyers must ordinarily petition the court for an award of fees, separate from and subsequent to settlement." *See id.* at 945.[3] Here, by contrast, the settlement expressly provides for a determination by the Court of the amount of fees to be awarded to class counsel. (*See* Amended Joint Stipulation of Settlement ¶ 29(a).) Although the settlement further provides that if the Court does not award the maximum amount of $11,250,000 in fees, the difference between that figure and the amount actually awarded will be returned to defendants, such provision does not conflict with *Staton*; the provision for court review of the amount of fees awarded adequately addresses the Ninth Circuit's concern that class counsel might negotiate "an excessive fee at the expense of the class." *See id.* at 972.

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[3] Although, as the New York Attorney General correctly notes, the Ninth Circuit described with approval a procedure by which the parties would agree to the amount of a common fund and provide for court determination of the amount of fees to be awarded from the fund, with distribution of the remainder "to the class rather than reverting to the defendant," *see id.* at 972, the Ninth Circuit stressed that such procedure was but one permissible alternative and that it did "not mean to preclude all others," *see id.* at 972 n.22.

Accordingly, the Court finds *Staton* does not warrant rejection of the settlement.

b. Objections of Anderson, Arkwright, Wilwerding, and Gabriel

Class members Anderson, Arkwright, Wilwerding, and Gabriel do not object to any particular provision of the settlement. Rather, each objects to the filing of the *Glass* action in the first instance. In particular, Anderson states that he is "offended" by "Financial Advisers who sue to 'recover' overtime and business expenses when they knew full well how [the] industry's compensation structure works"; he further states he wishes to "register [his] disgust at this lawsuit and settlement." (*See* Anderson Objection at 2.) Likewise, Arkwright expresses the opinion that the instant action "is shameful and disturbing" and contends that "[t]he people involved in bringing this action should try to work, earn an honest living and do the right thing instead of sucking of[f] others like a leach." (*See* Arkwright Objection at 1 (emphasis deleted)) Wilwerding states that he "object[s] to the entire settlement" because the plaintiffs "were never promised any compensation for overtime when they hired on"; he further offers his opinion that the instant action "is a pure opportunistic case which [in] the end result does no more than hurt the investors whom we serve."[4] (*See* Wilwerding Objection at 1-2.) Gabriel states that the suggestion that "UBS somehow has mistreated [him] is an affront to both [his] own positive experiences and to the closely-guarded reputation of th[e] firm" and expresses the opinion that "all of the time and money wasted by this sorry lawsuit could have been deployed productively elsewhere by UBS and all involved." (*See* Gabriel Objection at 1-2.)

As each of the above-referenced objections challenges the filing of the lawsuit, and not the fairness of either the settlement as a whole or any particular provision thereof, such objections do not support rejection of the settlement. Anderson, Arkwright, Wilwerding, and Gabriel were free to opt out if they did not wish to participate in the instant litigation, and Wilwerding in fact did so.

c. Objections of Pappous

Pappous objects to the allocation of settlement proceeds. In particular, Pappous argues that "the cost of [his] labor was just as much in Virginia as it was in New Jersey, Pennsylvania, or New York" and that there "is no justifiable methodology which allocates 60% more ($75 vs. $120) to the individuals who worked in" New Jersey, Pennsylvania and New York. (*See* Pappous Decl. at 1.)

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[4] Wilwerding also expressly opted out of the instant action. (*See* Wilwerding Objection at 4.)

The parties, however, do not purport to compensate class members from New Jersey, Pennsylvania, and New York at a higher rate because Financial Advisers in those states have higher salaries, but rather because their legal claims are more valuable in those states than the claims of class members in other jurisdictions.

Accordingly, Pappous's objection does not warrant rejection of the settlement.

d. Objections of Cintron

Cintron asserts two objections to the proposed settlement. At the outset, Cintron argues that the settlement fails to compensate him for the actual amount of overtime he worked. Cintron misunderstands the purpose of the settlement, which is not to provide full compensation for all overtime hours each class member worked, but to compensate class members for the value of their legal claims to overtime pay. As the parties point out, the recent Opinion Letter from the Department of Labor provides support for UBS's contention that class members' are unlikely to be able to prove their entitlement to any overtime pay under the FLSA. The Court finds this objection does not warrant rejection of the settlement. Additionally, Cintron objects to the amount of attorneys' fees sought by plaintiffs' counsel. The Court will address such objection below in connection with class counsel's motion for attorney's fees.

e. Objections of Bavishi

Although Bavishi has submitted objections to the settlement, he also has opted out. (*See* Holland Decl. ¶ 23 and Ex. A.) Consequently, as Bavishi is no longer a class member, he has no standing to object.[5] *See* Fed. R. Civ. P. 23(e)(4)(A) (providing "any class member may object to a proposed settlement"); *Mayfield v. Barr,* 985 F.2d 1090 (D.C. Cir. 1993) (holding "[t]hose who are not class members, because they are outside the definition of the class or have opted out" lack standing to object to class settlement); *Jenson v. Continental Finance Corp.,* 591 F.2d 477, 482 n.7 (8th Cir. 1979) ("Opt-outs . . . are not members of the class and hence are not entitled to the protection of Rule 23(e).").

Accordingly, the Court does not consider Bavishi's objections.[6]

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[5] On January 17, 2007, Bavishi filed a motion to opt back into the settlement. Because Bavishi, by such motion, seeks to assert an untimely claim, and because the settlement provides that the claims administrator "will perform the duties of . . . resolving any disputes regarding claims by the Class Members" and will "timely notify class claimants whose claims are untimely or denied for other reasons," (*see* Amended Joint Stipulation of Settlement ¶¶ 3, 46), Bavishi's motion is hereby DENIED without prejudice to his making such request of the claims administrator.

[6] The Court further notes that Bavishi's objections relate to (1) issues that are not the subject of the class claims and (2) Bavishi's misunderstanding of class action litigation procedures, and, consequently, would not require rejection of the settlement even if the Court were to consider such objections.

f. Objections of Evans

Evans has submitted numerous objections to the settlement and to the amount of attorneys' fees sought by class counsel. The Court first will address Evans's substantive objections, and thereafter, in discussing class counsel's application for fees, will address Evans's objections to the amount of fees.

i. Damages Analysis

Evans's first objection is that the parties have provided no analysis of the value of the class's claims. Evans contends that the parties "should be able to provide the Court and class members with information on the monetary value of: (a) the class's 'unpaid overtime' claims; (b) the class's 'unreimbursed business-related expenses' claims; (c) the class's 'improper training error deduction' claims; and (d) the class's claims for 'interest and penalties.'" (*See* Evans Objection at 4:23-5:1.) Evans contends that without such information, the Court cannot make a rational determination as to whether the amount of the settlement is fair, reasonable, and adequate.

At the August 11, 2006 hearing on the parties' motion for preliminary approval of the settlement, the Court noted that because the parties had failed to provide an estimate of the actual losses claimed by the class members, the Court had no way of determining whether the amount of the settlement was acceptable. (*See* New York Attorney General Decl. Ex. 1 at 11:25-12:22.) As the parties note, they have represented to the Court that the settlement constitutes approximately 25 to 35% of the estimated actual loss. (*See id.* at 14:2-3.) At the final fairness hearing, the parties presented a lengthy discussion of the above-referenced estimate, in which they represented that their estimate of the maximum loss to the class was based on hard data obtained from interviews with class members, computer log-in records, and payroll records. The Court is satisfied that the parties had a reasonable factual basis for their estimate that the $45,000,000 settlement represented, at a minimum, 25 to 35% of the loss to the class.

Accordingly, the Court finds the amount of the settlement was fair, reasonable, and adequate, and that the parties' failure to provide a detailed written analysis of the value of the claims does not warrant rejection of the settlement.

ii. Legal Analysis

Evans's next objection is that the parties have failed to "provide a detailed assessment of each theory of liability and the evidence and the law that would support or refute that theory." (*See* Evans Objection at 6:13-15 (internal quotation and citation omitted).) To the extent the parties are required to do so, the Court finds their various memoranda filed with this Court and with Judge Legge, as well as their presentation at the final fairness hearing, adequately set forth a legal and factual analysis of the claims.

iii. Adequacy of Class Representatives

Evans next argues that because each of the named plaintiffs is a former employee of defendants, the named plaintiffs might not be adequate representatives of a class that includes both current and former UBS employees. In particular, Evans notes that the settlement contains no statement as to whether any UBS policies will be changed with respect to class members who are current employees, a matter in which, as Evans observes, former employees have no interest.

Rule 23(a)(4) provides that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." *See* Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 626 (1997); *see also Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 512 (9th Cir. 1978) (describing "two criteria for determining the adequacy of representation"; "[f]irst, the named representatives must appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class"). As the parties observe, there is no conflict between the named plaintiffs and class members who are current employees of defendants. Both former and current employees are equally interested in obtaining compensation for the assertedly unlawful practices set forth in the complaint. The fact that, in any given case, some of the class members may have potential claims in addition to those raised by the named plaintiffs does not necessarily create a conflict of interest between the named plaintiffs and such class members.

Here, the purpose of the instant settlement is to provide compensation for assertedly unlawful practices occurring during the class period. Notably, the settlement provides for a release only of claims "arising during the Class Members' Released Period," which ends on the date of final approval of the settlement, (*see* Amended Joint Stipulation of Settlement ¶¶ 8, 48-49), and, thus, does not preclude any class member from filing suit against UBS for any future violation of the law. Consequently, if any class member is of the view that defendants' ongoing policies are unlawful, they remain free to challenge such policies in a future lawsuit.[7]

Accordingly, the Court finds the lack of provision for changes in defendants' policies does not warrant rejection of the settlement.

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[7] The Court further notes that class counsel, in both their fees motion and at the final hearing, represented that defendants have agreed to implement certain policy changes. (*See* Fees Motion at 2:27-3:15.)

iv. Allocation of Settlement Fund and Objections to Appointment of Judge Legge as Master

Evans next argues that the parties have not provided an adequate explanation for the allocation of settlement funds among the class members, in particular, the larger distribution to class members who worked in New York, New Jersey, and Pennsylvania as compared with the distribution to class members who worked in other states.

As noted, the Court, at the parties' request, appointed Judge Legge as special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, "to hear and determine whether the allocation formula in the settlement is fair, reasonable and adequate in light of any timely challenges to that allocation." (*See* Order Appointing the Honorable Charles Legge as Master Pursuant to the Stipulation of Parties, filed Dec. 7, 2006.) The parties thereafter submitted extensive briefing on the matter to Judge Legge, and Evans filed a supplemental objection raising concerns about the manner in which Judge Legge was appointed as master. (*See* Supplemental Objection of Plaintiff Class Member/Objector Marty Evans, filed December 21, 2006.)

On January 12, 2007, Judge Legge issued a "Report, Findings and Recommendations of the Master," in which he recommended this Court find "that the procedures for the appointment of the Master substantially complied with the requirements of Rule 53; were fair, adequate and reasonable; and that the Master has been duly appointed under Rule 53 with jurisdiction over the issue referred to him." (*See* Report, Findings, and Recommendations of the Master, filed January 12, 2007, at 3.) Judge Legge further recommended that "[t]he allocation formula . . . be found to be fair, reasonable, and adequate." (*See id.* at 9.)

(1) Objections to Appointment of Judge Legge

Evans stresses that his objection to the appointment of Judge Legge "relates to procedural irregularities surrounding the Order of appointment and has nothing to do with Judge Legge's qualifications to serve as special master." In particular, Evans contends, the order appointing Judge Legge did not comply with all of the requirements of Rule 53. In their motion for final approval, the parties do not address Evans's objections to the order appointing Judge Legge.

As Evans points out, an order appointing a master pursuant to Rule 53 "must state" *inter alia*, (1) "the circumstances – if any – in which the master may communicate ex parte with the court or a party"; (2) "the nature of the materials to be preserved and filed as the record of the master's activities"; and (3) "the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations." *See* Fed. R.

Civ. P. 53(b)(2). Although Evans correctly observes that the proposed order submitted by the parties and signed by Court fails to expressly set forth all of the above-referenced information, the Court, for the following reasons, agrees with Judge Legge that the order is in substantial compliance with Rule 53(b)(2). First, the Court has not communicated ex parte with Judge Legge, nor is it aware of any ex parte communications between Judge Legge and any party. Moreover, the Court is confident that Judge Legge, as a former federal judge, is well aware of the need to avoid ex parte communications absent specific authorization. Second, the order authorizes Judge Legge to "preserve any . . . testimony or evidence"; all materials submitted to Judge Legge, as well as the transcript of the hearing before him, have been made part of the record in the instant action. Third, the order expressly provides that the Court could "adopt Judge Legge's findings or revisit them at the January 19, 2007 hearing," (*see* Stipulated Appointment Order at 2:22-23), and thus establishes the time limits and procedure by which the Court would review Judge Legge's findings. Although the order does not expressly set forth the applicable standards for review of Judge Legge's findings, those standards are provided in Rule 53 itself. Because the parties did not stipulate that Judge Legge's findings of fact would be either "reviewed for clear error" or "final," the Court must review any such findings of fact de novo. *See* Fed. R. Civ. P. 53(g)(3). The Court also must review de novo all findings of law. *See* Fed. R. Civ. P. 53(g)(4). The Court may set aside any ruling on "a procedural matter only for an abuse of discretion." *See* Fed. R. Civ. P. 53(g)(5).

Evans further objects that he was not given an opportunity to be heard prior to the Court's appointment of Judge Legge as master. Rule 53(b)(1) requires a court to "give the parties notice and an opportunity to be heard before appointing a master"; Rule 53(a)(1) permits a court to appoint a master only to "perform duties consented to by the parties." *See* Fed. R. Civ. P. 53(a)(1), (b)(1). Here, plaintiffs and defendants expressly consented to the appointment of Judge Legge. Evans cites no authority requiring class counsel to obtain the consent of all members of the class prior to agreeing to the appointment of a master.

Finally, Evans notes that Rule 53 permits any party to file objections to a master's findings and that, accordingly, he and the other objectors to the settlement should be permitted to file objections to Judge Legge's findings. In particular, Rule 53(g)(2) provides that any "party may file objections to – or a motion to adopt or modify – the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time." *See* Fed. R. Civ. P. 53(g)(2). Assuming, *arguendo,* the individual class members have such a right separate from class counsel, here, the Court did "set[ ] a different time," by providing that Judge Legge's findings could be "revisit[ed]" at the January 19, 2007 fairness hearing. To date, no objections to

Judge Legge's findings have been filed, and none were raised at the final fairness hearing.

Accordingly, the Court finds Evans's procedural objections to the order appointing Judge Legge provide no basis for rejecting the proposed settlement.

(2) Objections to Allocation of Settlement Fund

Evans objects that the parties have not provided the Court with "specific information on how the formula for allotting settlement benefits was developed"; in particular, Evans contends, the increased payout for class members who worked in New York, New Jersey, and Pennsylvania appears to be based on speculation.

Subsequent to the date of Evans's objections, the parties filed detailed briefing on this issue with Judge Legge, explaining that although the value of the class overtime claims is fairly consistent throughout all jurisdictions (with the exception of California), the value of the unlawful deductions claims differs significantly between two groups of states. In the first group, which defendant describes as the "freedom to contract states" and which include the "vast majority" of the jurisdictions at issue in the instant settlement, courts "typically sustain reimbursement agreements between employers and employees, contracts defining wages, and/or contracts permitting wage deductions." (*See* Defendants' memorandum to Judge Legge at

6:23-7:3.) According to defendants, their liability in "freedom to contract" states is "non-existent or less than its exposure in other states." (*See id.* at 7:12-13.) In the second group, consisting of New York, New Jersey, and Pennsylvania, the law, according to defendants, is not as clear with respect to the propriety of the deductions at issue. Accordingly, "[t]o account for the parties' greater uncertainty regarding the likely outcome of Class Member's deductions in these three states, [the parties] agreed to allocate a larger portion of the Settlement proceeds to Class Members in New York, New Jersey, and Pennsylvania." (*See id.* at 7:25-8:3.)

Judge Legge, in his January 12, 2007 Report, concluded that the allocation formula is fair, reasonable, and adequate. Having reviewed de novo the memoranda submitted to Judge Legge, as well as the transcript of the January 4, 2007 hearing before Judge Legge, the Court agrees that the parties have set forth a reasoned basis for treating claimants employed in New York, New Jersey, and Pennsylvania differently from claimants employed in other jurisdictions.

Accordingly, the Court finds Evans's objections to the allocation formula do not warrant rejection of the settlement.

v. Separate Settlements in *Bowman* and *Glass*

Evans next argues that the parties have failed to adequately explain why *Bowman* and *Glass* were filed as separate actions and, consequently, why California employees are not part of the *Glass* settlement. As discussed above, *Bowman* and *Glass* were filed at separate times by separate counsel. Moreover, *Bowman* was filed and settled prior to the filing of any of the actions that ultimately were consolidated in *Glass*.

Accordingly, this objection does not warrant rejection of the instant settlement.

vi. Claims Administration

Evans's next objection is that the settlement grants the claims administrator the final word in resolving disputes over claims to the settlement fund. In particular, the settlement provides that the claims administrator "will perform the duties of . . . notifying the Parties of and resolving any disputes regarding claims by the Class Members." (*See* Amended Joint Stipulation of Settlement at 3 ¶ 3.) Evans contends the settlement should be amended to grant the class members the right to petition the Court in the event of a dispute as to the manner in which a claim is resolved by the claims administrator.

The parties, in response, argue that the resolution of claims disputes is not complex, and that

Rust Consulting, Inc. ("Rust"), the claims administrator, is an experienced neutral evaluator who is capable of reaching a fair resolution. Consequently, the parties argue, adding court review to the process "would delay the Settlement for no ascertainable purpose." (*See* Motion at 17:12-25.)[8] Evans has submitted no evidence calling into question Rust's ability to resolve in a fair manner disputes as to claims, and has submitted no authority requiring the Court to resolve any such disputes.

Accordingly, this objection does not warrant rejection of the settlement.[9]

vii. Joseph Glass NASD Arbitration

Evans's final objection to the settlement is that the parties have provided no information about named plaintiff Joseph Glass's claims in NASD arbitration No. 04-04995. Evans contends such information is "needed to ensure that there is nothing about . . . Glass's NASD claims that would affect his ability to adequately represent the class." (*See* Evans Objections at 11:12-17.) In response, the parties represent that Glass's arbitration "does not encompass any overtime or wage deduction claims and is entirely irrelevant to th[e] Settlement." (*See* Joint Motion at 15 n.11.) At the final fairness hearing, the parties informed the Court that the subject of the NASD arbitration was race and age discrimination. No evidence has been presented to the contrary.

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[8] David Holland ("Holland"), Principal Consultant for Rust Consulting, Inc., attests that as of January 4, 2007, he has received 482 claim forms that dispute the employment history provided to class members on their claim forms. (*See* Holland Decl. ¶ 20.) The settlement provides that any such disputes shall be resolved by the claims administrator if the parties are unable to reach an agreement as to their resolution. (*See* Amended Joint Stipulation of Settlement ¶ 44.)

[9] Evans also objects that, although the Settlement provides for a reasonable payment for the services of the claims administrator, no information about such cost has been provided. Holland has since attested, in his declaration filed January 4, 2007, that "[t]he total estimated cost for the administration of this Settlement, including fees incurred and future costs for completion of the administration, is $182,847.90." (*See* Holland Decl. ¶ 24.)

Accordingly, this objection does not warrant rejection of the settlement.

g. Conclusion

For the reasons set forth above, the Court finds the proposed settlement is fair, reasonable, and adequate, and will GRANT the parties' joint motion for approval thereof.

B. Motion for Attorneys' Fees, Costs and Class Representative Enhancements

Class counsel moves for an award of fees and costs in the amount of $11,250,000, as well as a $25,000 payment to each of the four named plaintiffs. As noted, the settlement provides for a maximum payment of "up to $11,250,000.00 in attorney' fees and litigation costs to Class Counsel, subject to Court approval" as well as "a pool of up to $100,000.00 in enhancements to be divided among the Class Representatives, subject to Court approval." (*See* Amended Joint Stipulation of Settlement ¶ 29(a).)

1. Fees and Costs

a. Legal Standard

"Under the 'common fund' doctrine, 'a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *See Staton,* 327 F.3d at 967 (quoting *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980)). "'The doctrine rests on the presumption that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.'" *Id.* (quoting *Boeing,* 444 U.S. at 478). Under the common fund doctrine, the Court may assess "attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.'" *See id.* (quoting *Boeing,* 444 U.S. at 478).

Under the common fund doctrine, the Court may award fees by using either the percentage-of-the fund method or the lodestar method, and "no presumption in favor of either the percentage or the lodestar method encumbers the district court's discretion to choose one or the other." *See In re Washington Public Power Supply System Securities Litigation,* 19 F.3d

1291, 1296 (9th Cir. 1994). "As always, when determining attorneys' fees, the district court should be guided by the fundamental principle that fee awards out of common funds be '*reasonable under the circumstances.*'" *Id.* (quoting *Florida v. Dunne,* 915 F.2d 542, 545 (9th Cir. 1990) (emphasis in original)).

The Ninth Circuit has repeatedly held that 25% of the gross settlement amount is the benchmark for attorneys' fees awarded under the percentage method and that if the Court departs from that benchmark, the record must indicate the Court's reasons for doing so. *See, e.g., Powers v. Eichen,* 229 F.3d 1249, 1256-57 (9th Cir. 2000). "The benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *See Six Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir. 1990).

b. Discussion

Class members Cintron and Evans, as well as the New York Attorney General, have filed objections to the amount of attorneys' fees and costs sought by class counsel. Cintron objects that the amount of attorneys' fees and costs sought "is disproportionate and ridiculous." (*See* Cintron Objection at 1.) The New York Attorney General argues that the fees sought are "unreasonable" in light of "the minimal work required from plaintiffs' counsel and the insignificant risk of non-recovery which they ran," and suggests that, under the circumstances, an award based on the lodestar would be more appropriate. (*See* Amicus Curiae Memorandum of New York Attorney General at 15-16.) Evans contends the Court should conduct a "lodestar cross-check" against class counsel's request for $11,250,000 in fees and costs.[10] (*See* Evans Objection at 12.)

The Ninth Circuit has held that the Court may, but is not required to, compare the lodestar and the 25% benchmark to determine if the 25% benchmark results in an inappropriately high or low fee. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-51 (9th Cir. 2002) (observing that calculation of lodestar provides check on reasonableness of percentage award; affirming district court's conclusion that fee award of 28% of fund and 3.65 times lodestar amount was reasonable); *Fischel v. Equitable Life Assurance Society of the United States*, 307 F.3d at 1001, 1007 (9th Cir. 2002) (finding no error where district court awarded fees under lodestar method and failed to compare lodestar with 25% benchmark).

In the instant action, although class counsel has not provided the Court with information from which the Court could calculate the lodestar, there can be no doubt that the lodestar would result in a fee substantially lower than the $11,250,000 claimed. The dockets for the three cases that ultimately were consolidated in the *Glass* action show no litigation activity of substance other than the filing of the complaints. (*See* New York Attorney General Decl. E's. 10, 12, 17.) Additionally, because the instant settlement was reached prior to the filing of the *Glass* action, in which those three cases were consolidated, there was no litigation in this Court prior to settlement. Since that time, however, a considerable number of filings on behalf of the plaintiff class have been made and, of course, those filings do not necessarily reflect all the hours spent by class counsel out of court. Nevertheless, the Court would not expect those out-of-court hours to affect the lodestar to the extent of producing a fee as high as that claimed herein under the percentage method.

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[10] Evans's additional, objection, that class counsel has not documented the actual costs incurred, has been addressed by the declaration of class counsel, filed January 5, 2007, attesting that class counsel have incurred actual expenses in the total amount of $56,924.07, and providing a summary thereof. (*See* McInerney Decl. ¶ 19 and Ex. F.)

The early settlement of the instant action resulted in significant benefit to the class, however. In light of the recent Opinion Letter of the Department of Labor, issued November 27, 2006, defendants likely would not agree to as large a settlement, or, indeed, any settlement, if the parties were attempting to negotiate a settlement today. Class counsel expressly recognized the negative impact an opinion letter could have on the instant litigation well before the November 27, 2006 Opinion Letter was issued. (*See, e.g.*, Plaintiff's Opposition to Lawrence R. Kaufmann's Motion to Intervene, filed

Oct. 27, 2006, at 3-4 (noting "[t]he whole idea that stockbrokers can recover for improper wage deductions or sue for overtime is clearly a novel one . . . [and] a new opinion letter could end this genre as quickly as it did a few years ago when the Department of Labor wrote that insurance adjusters were exempt from overtime").) Class counsel achieved an excellent result for the class members by settling the instant action promptly.

Although the Ninth Circuit has noted that where an action is settled quickly after the action is filed, "the lodestar calculation may convince a court that a lower percentage [than the 25% benchmark] is reasonable," it also has explained that it did "not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly." *See Vizcaino,* 290 F.3d at 1050 and n.5. Indeed, as the Ninth Circuit has observed, "it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." *See id.* at 1050 n.5.

Moreover, the Ninth Circuit has held the "relevant circumstances" that could justify an *upward* departure from the 25 percent benchmark include the achievement of "exceptional results" for the class. *See Vizcaino,* 290 F.3d at 1048 (affirming fee award of 28 percent of settlement fund). Under the circumstances presented here, where the early settlement resulted in a significant benefit to the class, the Court finds no need to conduct a lodestar cross-check.[11] Class counsel's prompt action in negotiating a settlement while the state of the law remained uncertain should be fully rewarded.

The New York Attorney General and Evans further argue that even if fees are awarded under the percentage method, the Court should base such fees on the amount of the settlement fund actually claimed by the class. The Ninth Circuit has held, however, that the district court must award fees as a percentage of the entire fund, or pursuant to the lodestar method, not on the basis of the amount of the fund actually claimed by the class. *See Williams v. MGM-Pathe Communications Co.,* 129 F.3d 1026, 1027 (9th Cir. 1997). Contrary to Evans' argument, the Court finds inapplicable the Class Action Fairness Act's provision that "any attorney's fee award to class counsel that is attributable to the award of . . . coupons shall be based on the value to class members of the coupons that are redeemed." *See* 28 U.S.C. § 1712(a). That statute, on its face, does not apply to non-coupon settlements.

Accordingly, the Court finds the benchmark of 25% of the settlement is reasonable under the circumstances presented herein.

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[11] Consequently, the Court also rejects Evans's argument that because the class notice states defendants will not challenge the amount of fees sought by class counsel, (*see* Class Notice at 5 ¶ J), the Court must permit Evans to review class counsel's time records.

2. Enhancements

Class counsel requests that the Court award a $25,000 enhancement to each of the four class representatives for their assistance in the instant litigation. As noted, the settlement provides for "a pool of up to $100,000.00 in enhancements to be divided among the Class Representatives, subject to Court approval." (*See* Amended Joint Stipulation of Settlement ¶ 29(a).)

Evans objects to payment of such enhancements, relying on a statement in the Committee Report on the Private Securities Litigation Act of 1995 ("PSLRA") that "lead plaintiffs are not entitled to a bounty for their service." (*See id.*; *see also* 15 U.S.C. § 78u-4(a)(4) ("The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class.").) The instant action is not an action brought pursuant to the PSLRA, however, and, consequently, is not subject to the PSLRA's ban on enhancements to lead plaintiffs. Where the PSLRA does not apply, the issue of "[w]hether to award [a lead plaintiff] for his efforts is within the Court's discretion." *See Van Vranken v. Atlantic Richfield Co.,* 901 F. Supp. 294 (N.D. Cal. 1995).

Evans further objects that the payments sought are "excessive" and that such payments "should be based on declarations filed by each proposed recipient, describing the services he performed on behalf of the class." (*See* Evans Objection at 21.) Class counsel has filed a declaration attesting that the named plaintiffs "provided a great deal of informal discovery to Class Counsel and a great deal of insight into the policies and practices of UBS," (*see* McInerney Decl. ¶ 20), and provided additional relevant detail at the final fairness hearing. Class counsel further attests that "these four individuals, all of whom are still currently employed in the securities industry, placed something at risk by putting their names on a complaint against one of the largest brokerage houses in America." (*See id.*) The Court finds such representations, although not as detailed a showing as Evans asserts is necessary, are sufficient to support approval of the requested enhancements.

Accordingly, the Court finds the requested payment of $25,000 to each of the named plaintiffs is appropriate.

CONCLUSION

For the reasons set forth above,

1. The parties' joint motion for final approval of settlement is hereby GRANTED.

2. Class counsel's application for attorney's fees, costs, and class representative enhancements is hereby GRANTED.

IT IS SO ORDERED.

Dated: January 26, 2007

/s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants-Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor-Appellant.

No. 07-15278

D.C. No.
CV-06-04068-MMC
Northern District
of California,
San Francisco

ORDER

(Filed May 18, 2009)

JOSEPH GLASS; DANTE
DIFRANCESCO; RALPH
CARBONE; DAVID
BACHRACH, individually
and on behalf of all others
similarly situated,

Plaintiffs,

and

MARTY EVANS,

Plaintiff-Appellant,

v.

UBS FINANCIAL SERVICES,
INC., a corporation; UBS
PAINE WEBBER, a
corporation; PAINE WEBBER
GROUP, INC., a corporation,

Defendants-Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor.

No. 07-15309

D.C. No.
CV-06-04068-MMC
Northern District
of California,
San Francisco

Before: FARRIS, NOONAN and McKEOWN, Circuit Judges.

The panel has issued an amended memorandum disposition. Accordingly, the petitions for rehearing are DENIED.

The full court has been advised of the Petitions for Rehearing En Banc and no judge of the court has requested a vote on the Petitions for Rehearing En Banc. Fed. R. App. P. 35. Appellants' Petitions for Rehearing En Banc are DENIED.

No further petitions for rehearing and petitions for rehearing en banc will be entertained.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE TJX COMPANIES RETAIL SECURITY BREACH LITIGATION	) CIVIL ACTION) NO. 07-10162-WGY

MEMORANDUM AND ORDER

(Filed Nov. 3, 2008)

YOUNG, D. J. November 03, 2008

On January 17, 2007, TJX Companies, Inc. ("TJX") publicly announced that hackers had compromised its computer systems. *See* Joseph Pereira, *How Credit-Card Data Went Out Wireless Door,* WALL ST. J., May 4, 2007, at A1. In what has been characterized as the largest retail security breach in history, the intruders made off with data relating to over 45,000,000 credit and debit cards used at TJX stores.[1] *Id.* They also obtained personal information, such as names, addresses, and social security numbers, provided by TJX customers in order to make merchandise returns without a receipt. *See id.*

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[1] In the related financial track litigation, banking associations representing banks who issued some of the affected cards asserted that this number drastically underestimates the scale of the intrusion and contended the hackers actually compromised the security of over 94,000,000 accounts. Banking Assoc. Pls.' Reply to Response to Not. Certify Class [Doc. 171] at 1. The precise number of accounts compromised may never be known. *See* Pereira, *Breaking the Code,* at A1.

Not long after news of the breach broke, angry TJX customers arrived at the courthouse door. *See, e.g.*, Compl. [Doc. 1] (filed January 29, 2007). In this District alone, consumers filed several complaints, many of them putative class actions. The Court consolidated these cases, *see* Case Management Order [Doc. 11], and later received additional cases by order of the Judicial Panel on Multidistrict Litigation, *see In re TJX Cos. Customer Data Security Breach Litig.*, 493 F. Supp. 2d 1382, 1383 (J.P.M.L. 2007).

By September, 2007, TJX and counsel for the consolidated putative consumer class action reached an agreement on settlement. *See* Initial Settlement Agreement [Doc. 140]. The parties amended the settlement terms after the Court provided feedback, *see* Mem. in Supp. Prelim. App. Settlement [Doc. 293] at 3, and submitted, in December 2007, the final version of the settlement agreement (hereinafter "the Agreement") along with a motion for preliminary approval. The Court granted this motion on January 9, 2008. After reviewing objections to the Agreement and holding a fairness hearing, the Court gave final approval to the Agreement on July 15, 2008.[2]

The Court now considers class counsel's petition for attorneys' fees.

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[2] The approval was not absolute. The Court struck from the settlement the provision that TJX hold a one-day special event sale during which all merchandise would be discounted. Fairness Hearing Tr. [Doc. 360] at 7-8.

I. THE FEE PETITION

Class counsel request that this Court award $6,500,000 in attorneys' fees.[3] Petition for Award of Fees and Expenses ("Petition") [Doc. 353] at 1. Because the Agreement did not create a common fund, class counsel utilized the lodestar method in order to reach their proposed fee award. Under the lodestar method, attorneys' fees are calculated by "determining the number of hours productively spent on the litigation and multiplying those hours by reasonable hourly rates." *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995). The resulting figure can then be enhanced through the application of a multiplier to account for the contingent nature of the action or other factors. *See, e.g., Boston & Maine Corp.* v. *Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 894 (1st Cir. 1985). *See also* 4 NEWBERG ON CLASS ACTIONS § 13:80 (4th ed. 2008).

Here, class counsel assert that approximately 7,400 hours were expended on this litigation by the three firms comprising Class Co-Lead Counsel and the twenty-two other firms involved, resulting in a lodestar of over $3,300,000.[4] Petition at 4-5 & n.3. Class counsel suggest that this Court apply a multiplier of 1.97 in order to reach the requested amount. *Id.* at 5.

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[3] Counsel also requested reimbursement for expenses and costs in the amount of $150,000. Petition for Award of Fees and Expenses ("Petition") [Doc. 353] at 1. The Court approved this portion of the request, subject to adequate documentation, at the fairness hearing. Fairness Hearing Tr. at 22.

II. OBLIGATION TO EVALUATE PETITION FOR REASONABLENESS

As part of the Agreement, TJX agreed to pay court-approved attorneys' fees not to exceed $6,500,000.[5] Settlement Agreement [Doc. 293 Ex. 1] ¶ 7.2. Accordingly, it does not contest class counsel's petition for fees. The acquiescence of the defendant, however, does not relieve this Court of its obligation to examine the fee request to ensure that the awarded fees are fair and reasonable. *Weinberger* v. *Great Northern Nekoosa Corp.*, 925 F.2d 518, 520, 522 (1st Cir. 1991). Judicial examination is necessary in this context to deter class counsel from accepting "less-than-optimal" settlement terms for the class "in exchange for red-carpet treatment on fees."[6] *Id.* at 524.

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[4] The three Co-Lead Counsel firms billed 4,758.4 hours, resulting in a lodestar of approximately $2,100,000. Petition at 5 n.3; *Id.* Ex. 1 (Wolf Popper billing sheet); *Id.* Ex. 6 (Berger & Montague billing sheet); *Id.* Ex. 10 (Barnow & Associates billing sheet).

[5] It also agreed to reimburse class counsel for reasonable costs and expenses associated with the litigation, up to a cap of $150,000. Settlement Agreement ¶ 7.2.

Nor is the Court's duty lessened by the fact that the amount awarded in fees and costs will not diminish the class recovery. Although TJX agreed to pay these expenses separate from and in addition to the money it has set aside to provide benefits to the class, Pls.' Suppl. Br. for Award of Fees [Doc. 366] at 8, the First Circuit has instructed that this type of scenario is one in which "heightened judicial oversight" is "highly desirable" because class members have little to no incentive to challenge the reasonableness of the requested fee. *Weinberger,* 925 F.2d at 525.

The Court is cognizant not only of its responsibility to the class but also to the public to ensure that the fees awarded here are reasonable. *See Duhaime* v. *John Hancock Mut. Life Ins. Co.,* 989 F. Supp. 375, 379 (D. Mass. 1997) (O'Toole, J.) ("Because any [fee] award has the potential for 'precedential value' in future cases, the Court owes a duty to the principled development of the law to exercise careful judgment in reviewing agreed-upon fees."). Because "[o]ne of the most significant considerations taken into account in setting the ultimate fee is the benefit conferred by the litigation," 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, AND MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1803.1 at 355 (3d ed. 2005), the Court turns its attention to the benefits secured by the Agreement.

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[6] This Court in no way suspects class counsel of any collusion or other untoward behavior in the negotiation of the Agreement. Indeed, the Court has praised counsel for its efforts on behalf of the class and the "excellent settlement" that resulted therefrom. *See, e.g.,* Fairness Hearing Tr. at 8, 9, 18. Nonetheless, scrutiny of all unopposed fee petitions – even those filed by counsel highly regarded by the Court – is necessary to further the deterrence objective.

III. BENEFITS TO CLASS

Class counsel, in support of their fee request, assert that the Agreement provides for over $200,000,000 in benefits to the class.[7] *See* Pls' Suppl. Br. for Award of Fees at 3. These benefits can be sorted into three groups by reference to those eligible to receive them.

The first category of benefits – which, incidentally, makes up the vast majority of the settlement's purported value – are available only to a subset of around 454,500 class members known as "unreceipted return customers." *See* Petition at 6. These customers returned merchandise to TJX without a receipt, provided personal information to TJX upon the return, and later received a letter from TJX explaining that their personal information may have been stolen during the data breach. Settlement Agreement ¶ 1.25. TJX agreed to provide these customers with a total of three years of credit monitoring,[8] including identity theft insurance. Settlement Agreement ¶ 2.1(a). Claiming it would cost each class member $390 to obtain this coverage for this length of time, Pls.' Mem. in Supp. Final App. at 3, and given the number of unreceipted return customers, class counsel values this benefit alone at over $177,000,000. Fairness Hearing Tr. at 5.

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[7] The settlement class encompasses "all Persons in the United States (including the District of Columbia), Puerto Rico or Canada who shopped at TJX Stores in the United States, Puerto Rico or Canada, made a purchase or return, have had or allege having had personal or financial data stolen or placed at risk of being stolen from TJX's computer systems, and who were or may be damaged thereby or who allege damage therefrom." Settlement Agreement ¶ 1.19.

TJX also agreed to reimburse unreceipted return customers who could document that, as the result of the intrusion, they incurred costs to replace their driver's licenses. Settlement Agreement ¶ 2.1(b). Additionally, the Agreement provides for TJX to reimburse certain unreceipted return customers whose social security numbers were the same as their driver's license, military, tax, or state identification numbers for losses over $60 (excluding credit or debit card charges) that occurred as a result of identity theft traceable to the breach.[9] Customers were required to submit both a written claim and proof of these losses,[10] *id.* ¶ 2.1(c)(i), and the aggregate amount payable by TJX was limited to $1,000,000, *id.* ¶ 2.1(c)(iii).

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[8] Some of these, customers accepted a previous offer by TJX to receive one year of credit monitoring. These individuals, under the settlement, would be eligible to receive an additional two years. *See* Settlement Agreement ¶ 2.1(a).

[9] Unreceipted return customers who accepted TJX's previous offer of credit monitoring were ineligible for this benefit. Settlement Agreement ¶ 2.1(c).

The second class of benefits could be claimed by class members – including unreceipted return customers – who certified that (1) they made a purchase with a credit card, debit card, or check at TJX stores during the relevant time periods and (2) that they incurred at least $5 in out-of-pocket expenses or lost time (valued at $10 an hour) as a result of the intrusion. *Id.* ¶ 2.2. These class members were given the option of receiving either a check or a voucher for use at TJX stores. The amount class members received in checks or vouchers was dependent on which of two options class members chose to demonstrate that they satisfied these prerequisites.

Under the "self-certification" option, class members needed only to state, under penalty of perjury, that they had made a check or card purchase and that they had suffered the required loss. *Id.* ¶ 2.2(a). These individuals would receive, at their option, either a $15 check or a $30 voucher. *Id.* The Agreement imposes a $10,000,000 cap on claims made by self-certifying class members, against which each claim, whether for a check or voucher, is counted as a $30 charge. *Id.*

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[10] The Agreement provides that TJX, after receiving these documents, may choose to accept, reject, or conduct further investigation with regard to any claim. Settlement Agreement ¶ 2.1(c)(I). Customers could submit any rejected claims to an independent arbitrator at TJX's expense. *Id.* ¶ 2.1(c)(ii).

On the other hand, class members who could provide documents proving that they both made a qualifying purchase (for example, a credit card statement) and suffered the requisite loss were eligible to receive a $30 check or $60 in vouchers. *Id.* ¶ 2.2(b). The Agreement imposed no cap on the value of vouchers that class members could claim via this method but limited the payout made in check form to $7,000,000. *Id.*

The third category of what class counsel characterizes as benefits secured to the class consists of those generally available to all class members. For example, TJX agreed to provide an "ombudsman" at a toll-free number to answer consumer questions on topics relating to the breach. *Id.* ¶ 2.4. Class counsel also conditioned agreement to the settlement upon a finding by its independent expert that TJX made a "prudent and good faith" attempt to minimize the likelihood of future security breaches, *id.* ¶ 2.5, which, according to class counsel, benefitted the class by permitting them to shop at TJX stores in the future with peace of mind. Fairness Hearing Tr. at 20. Finally, TJX agreed to bear the costs of notice and claims administration. Settlement Agreement ¶ 2.6. The cost of the notice program was $4,000,000. Pls.' Suppl. Br. for Award of Fees at 8. While claims administration obviously is ongoing, class counsel projects its cost will reach $500,000. *Id.*

IV. REASONABLENESS OF REQUEST

Determining whether a requested fee is reasonable requires consideration of a variety of factors. Some of the most typical include (1) the reaction of the class members to the settlement and proposed attorneys' fees; (2) the skill and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risk that the litigation will be unsuccessful; (5) the amount of time devoted to the case by counsel, and (6) the extent of the benefit obtained. *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 79 (D. Mass. 2005); *In re Lupron Mktg. and Sales Practices Litig.*, No. 01-CV-10861, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005) (Stearns, J.).

It is the final factor, the extent of the benefit, that here raises questions about the reasonableness of class counsel's fee petition. According to class counsel, the litigation produced over $200,000,000 in benefits for the class, such that their requested fee is a mere 3.25% of the settlement value. Petition at 7. At first glance, it may thus appear that the fee request is reasonable given, inter alia, the Court's stated satisfaction with the quality of class counsel, the thousands of hours expended on litigation, and the dearth of complaints from class members on the issue of fees.[11] As of October 30, 2008, however, class

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[11] At most, eighteen objections were filed by class members. Pls.' Mem. in Supp. Final Approval [Doc. 365] at 13. *But see* Def.'s Mem. in Supp. Final Approval [Doc. 363] at 15 & n. 11 (arguing that only fourteen objections were submitted and that

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members had claimed just over $6,100,000 in benefits, a figure unlikely significantly to increase.[12] *See* Rev. Ex. A to Pls.' Supp. Br. for Award of Fees [Doc. 366]. To grant the petition would thus put more money in the pockets of the attorneys than in those of the wronged clients in whose name the suit was brought.[13] When viewed through this prism, the

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the other four letters fail to present objections). Only a subset of these objected to the attorneys' fees.

[12] The deadlines to submit claims for credit monitoring, for vouchers and checks, and for reimbursement of costs incurred to replace driver's licenses all have passed. Def.'s Mem. in Supp. Final Approval at 8, 9 n.6.

Although unreceipted return customers are not required to submit claims for reimbursement of costs incurred due to identity theft until six months after the effective date of the settlement, *id.* at 8, the payout is not likely to be substantial. As an initial matter, the Agreement caps payout of these claims at $1,000,000. Settlement Agreement ¶ 2.1(c)(iii). Furthermore, the status of these claims to date suggests that the amount actually collected by the class will be small. As of July, 2008, class members had submitted almost 4,800 claims under this category. Def.'s Mem. in Supp. Final Approval at 8. As of October 24, 2008, none of the claims had been deemed valid, and no payout had been made. *See* Rev. Ex. A to Pls.' Supp. Br. for Award of Fees [Doc. 366].

[13] Even accepting that the costs of notice and claim administration should be counted as value received by the class members, the total benefit would be only $10,600,000. *See* Pls.' Suppl. Br. for Award of Fees at 8. Class counsel's requested fee would still appear to be disproportionately high in comparison to this figure.

Class counsel, noting that TJX spent $10,000,000 to improve its computer security after the breach and that they conditioned the settlement on the finding by its expert that TJX made a good faith effort to prevent future intrusions, suggests

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benefits obtained for the class seem "virtual rather than real," Fairness Hearing Tr. at 13, and the requested fee accordingly less reasonable.

What, then, is the proper basis for comparison? Class counsel urges this Court that it must consider "the entire basket of benefits . . . , not whether class members chose to submit a claim." Pls.' Suppl. Br. for Award of Fees at 9. Indeed, two circuit courts of appeal – the Second and the Ninth – have held that a district court committed an abuse of discretion when it awarded fees by reference to the latter rather than the former criterion. *See Masters* v. *Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436-37 (2d Cir. 2007) (noting that "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class"); *Williams* v. *MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (reasoning consideration of entire fund was required because defendants "knew, because it was in the settlement agreement, that the class attorneys would seek to recover fees based on the entire $4.5

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the Court add an additional $3,000,000 to the total value of benefits received by consumers. *Id.* at 6. This the Court declines to do. Counsel has presented no evidence that TJX took any action that it would not otherwise have taken due to the fact that an expert was required to make a finding of good faith. Indeed, this Court, as a matter of common sense and the information it learned during the related financial track litigation, considers it obvious that TJX would have shored up its vulnerabilities in any event due both to the need mitigate the public relations fallout from the breach and the pressure brought to bear by Visa and MasterCard.

million fund"). Furthermore, while not requiring lower courts to use the entire common fund as the basis for making a fee award, the Supreme Court and the Eleventh Circuit Court of Appeals have both indicated support, at least in some circumstances, for this practice. *See Boeing Co.* v. *Van Gemert,* 444 U.S. 472, 479 (1980) (permitting application of percentage-of-fund methodology to a "lump-sum judgment" to which "each member of a certified class has an undisputed and mathematically ascertainable claim"); *Waters* v. *International Precious Metals Corp.,* 190 F.3d 1291, 1295-97 (11th Cir. 1999) (holding that award based on total common fund, rather than on value of claims made, was not an abuse of discretion where the "total fund amount . . . was not illusory or meaningless").

There is a key distinction, however, between each of these decisions and the circumstances confronted by this Court. In all four cited cases, there was an actual common fund – whether created by settlement or judgment of the court – to which the percentage-of-fund method of determining attorneys' fees was applied. In contrast, the Agreement here creates no fund; it simply provides that TJX will pay claims on an as-made basis, subject to certain caps. In the same vein, although they justify their fee request in terms of percentages, class counsel have fashioned their request via the lodestar/multiplier approach. This difference blunts the impact of the cases upon which they rely. *See Weinberger,* 925 F.2d at 526 n.10 (noting that the absence of a "true common fund renders the percentage approach inapposite"). Indeed, the

Supreme Court in *Boeing* expressly refrained from ruling on the question of whether its decision was applicable to circumstances in which a class action judgment did not create a common fund but rather required a defendant "to give security against all potential claims." 444 U.S. at 480 n.5.

Furthermore, there is support for the proposition that the reasonableness of a fee award properly may be judged in comparison to the benefits actually claimed by the class. *See* 7B WRIGHT, MILLER, AND KANE, *supra,* § 1803.1 at 380 (noting split of authority). Justice Sandra Day O'Connor, writing to deny certiorari in *Waters,* noted "several troubling consequences" of an approach that failed to require "some rational connection between the fee award and the amount of the actual distribution to the class" and spoke in favor of granting review of the question "in an appropriate case." *International Precious Metals Corp.* v. *Waters,* 530 U.S. 1223, 1223 (2000) (O'Connor, J., writing on denial of certiorari). In addition, the Fifth Circuit has upheld a district court's choice to grant fees by reference to the claims made by the class. *See Strong* v. *BellSouth Telecomms.,* 137 F.3d 844, 852-53 (5th Cir. 1998). Significantly, the circumstances in *Strong* are not so different than those here. There was no common fund created, and the district court indicated that it was concerned that the valuation of benefits created by litigation given by class counsel was "illusory." *Id.* at 853. *See* Fairness Hearing Tr. at 13 (expressing concern that disparity between valuation given by class counsel and value of claims actually made by class demonstrates the benefits referenced by class counsel are "virtual rather than real").

Similarly, in *Duhaime* v. *John Hancock Mutual Life Insurance Company,* 989 F. Supp. 375, 379 (D. Mass. 1997), Judge O'Toole in this District stated that "the proportionality of the fee to the relief actually accruing to the class is an . . . important consideration in assessing the reasonableness of the fee award." Thus, the court chose to withhold a portion of the requested fee until after class members submitted their claims, permitting the court to determine whether the actual value created by the litigation approached that estimated by class counsel. *Id.* at 379-80. The court considered this the best way to ensure "the fee awarded [was] appropriate to the value actually received by the class members." *Id.* at 378.

In a final example, the Northern District of California adjudged a fee award to class counsel by reference to the claims made by the class – notwithstanding *Williams,* 129 F.3d 1026 – where the "defendant did not agree to pay a certain dollar amount to the class" but instead agreed only to pay for those claims made in a timely fashion. *Yeagley* v. *Wells Fargo & Co.,* No. 05-03403, 2008 WL 171083, at *6 (N.D. Cal. Jan. 18, 2008) (Breyer, J.). In rejecting class counsel's argument that it must weigh the fee petition with reference to what the defendant *could* have paid under the settlement, the court asserted that this would require "adopt[ing] [a] fiction." *Id.* at

*7. This was especially true given that the settlement agreement simply provided that the defendant agreed to pay fees "*not to exceed* $1.5 million . . . thus expressly [leaving] open the possibility that the Court would award less than $1.5 million and [leaving] unanswered the amount of the 'common fund' for the purpose of computing a reasonable attorney's fee."[14] *Id.* at *8 (emphasis in original).

At the core of the *Yeagley* decision was the court's concern that the valuation of the settlement proffered by class counsel was "pure fantasy" because there was no evidence that "suggest[ed] that the parties reasonably believed that [the defendant] would actually pay anything near that amount." *Id.* Furthermore, the court indicated a desire to encourage class counsel, by tying fees to claims actually made, to design settlements that offer benefits that actively appeal to the consumers they represent, to come up with more effective notice programs, and to adopt mechanisms that lend themselves toward getting benefits to the consumer. It reasoned:

> To award class counsel the same fee regardless of the claim participation rate, that is, regardless of the enthusiasm of the class for

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[14] It was on this basis that *Yeagley* distinguished *Williams*, in which the settlement agreement contemplated that $4,500,000 be the fund used to evaluate the award of attorneys' fees. *See Yeagley*, 2008 WL 171083, at *8; *see also Williams*, 129 F.3d at 1027.

> the benefits purportedly negotiated on their behalf, would reduce the incentive in future cases for class counsel to create a settlement which actually addresses the needs of the class. . . . If the Court takes [the ineffectiveness in fashioning relief] into account in setting the fee, in future litigation class case counsel will design a settlement that actually reaches consumers, perhaps through a different mode of communication. If the Court ignores the settlement's effectiveness, as class counsel urges, there is little incentive to design an effective settlement since they will receive the same fee regardless. Common sense dictates that a reasonable fee in a class action settlement is a fee that takes into account the actual results obtained.

Id. at *9.

The *Yeagley* court thus touches on the issues that drive the Court's hesitancy here. Simply awarding fees by reference to the valuation of the settlement presented by counsel requires a court to ignore two interrelated realties about class action litigation. First, only a fraction of any given class is likely to claim the benefits provided for in a settlement. Indeed, "[i]t is not unusual for only 10 or 15% of the class members to bother filing claims," and "[w]hen settlements require class members to file statements or proofs of claim in order to receive their share . . . 'response rates are often very small, and rarely exceed 50%'." Christopher R. Leslie, *The Significance* *of Silence: Collective Action Problems and Class Action Settlements,* 59 FLA. L. REV. 71, 119-20 (2007) (quoting *Petruzzi's Inc.* v. *Darling-Delaware Co.,* 983 F. Supp. 595, 605 (M.D. Pa. 1996)). *See also Sylvester* v. *CIGNA Corp.,* 369 F. Supp. 2d 34, 52 (D. Me. 2005) ("'[C]laims made' settlements regularly yield response rates of 10 percent or less."). In any given case, class member nonparticipation may be attributed to a variety of factors: an ineffective notice program that fails to make class members aware of their rights, unappealing benefits that do not provide sufficient incentive for class members to invest the effort to submit a claim, or a claims process that is confusing, time-consuming, or requires class members to submit documentation or information they are unlikely to have in order to obtain relief.[15] The fact remains,

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[15] For example, Bed Bath & Beyond recently settled a class action lawsuit alleging it misrepresented the thread count of certain bed sheets. The class encompassed any consumer who purchased certain products from 2000 to 2007. Bed Bath & Beyond Thread Count Class and Settlement Notice at 1, *available at* http://bbbthreadcountsettlement.com/pdfs/BBT_NOT_071126.pdf. In order to obtain the most attractive relief – a refund of the purchase price if the consumer no longer wished to keep their sheets or a $10 gift card to Bed Bath & Beyond if they did – the consumer had to produce a receipt, email shipping confirmation, packing invoice, or credit card or bank statement demonstrating they purchased the offending product. *Id.* Common sense indicates that, given that bed sheets constitute a relatively small-scale purchase, an average consumer is unlikely to keep this documentation for years.

Those consumers who could not produce a document were not altogether excluded from the settlement. They were eligible to receive a 20% off coupon for a purchase at Bed Bath & Beyond

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however, that in a reversionary common fund or a claims-made settlement, the defendant is likely to bear only a fraction of the liability to which it agrees.

Second, attorneys for each side bargain knowing that this is true. Thus, class counsel can – and likely often do – push defendants for higher payout caps or fund amounts in order to expand the basis for their fee petition without any real expectation that those additional funds will be claimed by the class. *See In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 736 (1st Cir. 1999) ("In certain types of complex litigation, the lawyers' monetary interests often comprise a tail that wags the dog."); *Waters*, 190 F.3d at 1297 (noting that the values attached to "many" class action settlement funds are "illusory" or "meaningless"); Leslie, *The Significance of Silence, supra*, at 83 ("To convince judges to award significant attorneys' fees, the lawyers who negotiated the settlement may attempt to make [it] seem more significant than it is."). *See also* William B. Rubenstein, *The Expert's Corner: Percentage of What?*, 1 CLASS ACTION ATT'Y FEE DIG. 63, 64 (March 2007) ("The weakness in this approach [of awarding fees based on benefits made available] is it arguably sets up a conflict between counsel and the

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if they stated under oath that they made a qualifying purchase during the relevant time period. *Id.* These class members, however, were also required to give specific information about their purchase, including the date, the price, and the location of the store. *Id.* The notion that consumers would still retain these details of a relatively trivial purchase years after the occurrence borders on the ludicrous.

class by creating an incentive for counsel to accept a settlement unlikely to yield a high claiming rate – e.g., a coupon – in exchange for being guaranteed a percentage of the fund made available, not claimed."). At the same time, defendants can agree to these demands – permitting them more expeditiously to settle the case and minimize their overall costs – at little risk to themselves. *See Sylvester*, 369 F. Supp. 2d at 52 (noting that the "parties' expectations of a low response rate [with regard to a class action settlement] gives the reverter clause real value for Defendants").[16]

Similarly, unscrupulous class counsel may agree to conditions on a settlement – such as a short timeframe in which to make claims or a burdensome claims procedure – in order to obtain additional concessions from the defendant that purportedly increase the value created by the litigation and that support an enhanced fee award. The defendant, meanwhile, may grant these concessions precisely because the conditions attached to them would make it unlikely that a significant number of class members would cash in.

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[16] The likelihood of such pseudo-negotiations increases in inverse proportion to the likelihood of an actual trial upon genuine evidence. As this Court has remarked in the related area of multi-district litigation, an over-emphasis on settlement rather than trial preparation tends unfairly to skew the bargaining process. *See Delaventura* v. *Columbia Acorn Trust*, 417 F. Supp. 2d 147, 153-55 (D. Mass. 2006). Or as Professor Samuel Issacharoff, Visiting Professor of Law at Harvard Law School, tells his students with succinct brilliance, "Multi-district litigation is like the old Roach Motel ad: 'Roaches [the transferred cases] check in – but they don't check out.'"

At bottom, class action litigation should benefit the individuals who have been harmed. To be sure, class action lawsuits have a valuable deterrent role to play, and there is therapeutic and punitive value in requiring defendants to pay for wrongful conduct, regardless of to whom those monies are transferred. But these considerations ought not cause courts complacently to abide an institution that fails efficiently and effectively to deliver relief into the hands of those in whose name it was established – the class.

At its core, the problem appears to be just that – institutional. As discussed above, class counsel can and surely do contribute to the problem in some cases by placing their interests before those of the class or by failing to give adequate thought to matters such as how the class members may best be reached or what benefits may most be appreciated. The circumstances of this case, however, demonstrate that even when class counsel perform ably, with integrity, and with an eye toward ensuring that class members are aware of a settlement that offers them an opportunity to claim benefits of value with a minimum of fuss, there still may be underwhelming class participation. For example, just 14,496 of the approximately 454,500 unreceipted return customers – slightly more than three percent – claimed the credit monitoring benefit. *See* Rev. Ex. A. to Pls.' Supp. Br. for Award of Fees.

Simply put, the class action vehicle is broken. While it may not instantaneously or completely resolve the problems that currently inhere in this type of litigation, tying the award of attorneys' fees to claims made by class members is one step that judges can take toward repair. This approach will not only encourage more realistic settlement negotiations and agreements, but also will drive class counsel to devise ways to improve how class action suits and settlements operate. *See* Deborah R. Hensler and Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform,* 64 LAW & CONTEMP. PROBS. 137, 150 (2001) ("'The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.' To this end, . . . analysts recommend[ ] that judges award fees based on the actual amounts paid out by defendants to class members, notwithstanding contrary case law." (quoting DEBORAH HENSLER ET AL., RAND, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN – EXECUTIVE SUMMARY 33 (1999))). Class counsel will have an incentive to pay attention to the needs and desires of the class and to "think outside the box" to devise better notice programs, settlement terms, and claim procedures, all to the benefit of the consumers who have been harmed.

Linking attorneys' fees to claims serves two additional objectives. First, it prevents "windfalls" for attorneys created by "class apathy." *In re Arakis*

Energy Corp. Sec. Litig., No. 95 CV 3431, 2001 WL 1590512, at *14 (E.D.N.Y. Oct. 31, 2001). Although commentators dispute whether windfalls for class counsel are a widespread problem, *see* 7B WRIGHT, MILLER, AND KANE, *supra,* § 1803.1 at 339-40 (asserting there is a "virtual absence of empirical data showing any significant incidence of excessive fees"), making attorneys' fees conditional on class participation would eliminate even isolated incidents of excessive fees and help preserve the legitimacy with which the public views the class action vehicle and the judicial system in general. *See City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974), abrogated by *Goldberger* v. *Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000) ("For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the court should avoid awarding windfall fees and that they should likewise avoid every appearance of having done so.") (internal quotation marks omitted).

Second, there are surely plaintiffs' lawyers who bring putative class action lawsuits without merit, assuming, correctly, that in many cases the defendant will settle the case to avoid a small probability of a substantial judgment. *See,* Louis W. Hensler III, *Class Counsel, Self-Interest and Other People's Money,* 35 U. MEM. L. REV. 53, 65-68 (2004) ("Courts have expressly recognized that certification can encourage meritless claims by transforming any claim into a megasuit, thereby creating instant settlement leverage with little or no relation to the relative merits of the claim."). *See also* Lance P. McMillian, *The Nuisance Settlement "Problem": The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 252 & n. 94 (2007). As Justice O'Connor rightfully noted, the failure to link fees to benefits claimed thus "could encourage the filing of needless lawsuits." *International Precious Metals Corp.*, 530 U.S. at 1223. Accordingly, the approach advocated here would be a positive step toward the preservation of judicial resources.

Of course, there are those who assert that if the courts of the United States were to adopt this Court's position, plaintiffs' lawyers would have no incentive to bring putative class actions at all, regardless of their merit, because they would have no expectation of adequate compensation for their efforts; thus, broad swaths of wrongful conduct would go unpunished and undeterred. *See* Hailyn Chen, *Attorneys' Fees and Reversionary Fund Settlements in Small Claims Consumer Class Actions*, 50 U.C.L.A. L. REV. 879, 892 (2003) ("Limiting class counsel to a fee based on a percentage of what class members actually claim will, in many instances, result in a fee that is so small as to prevent class action attorneys from pursuing such cases. . . ."); 7B WRIGHT, MILLER, AND KANE, *supra*, § 1803.1 at 369 ("If counsel did not have the prospect of an award that took account of the risks and uncertainties, the necessary incentive would be lacking and a major weapon for enforcing various public policies would be blunted."). In this case, class counsel argued that making "receipt of a fee contingent upon class members submitting a claim form . . . would discourage, if not eliminate, capable and experienced counsel from risking years of litigation against well-financed companies." Pls.' Supp. Br. for Award of Fees at 17. The Court is not overly concerned with such doomsday predictions. As an initial matter, this argument rests on the premise – which this Court does not accept – that claim rates will always remain low. To the contrary, the Court believes that with creativity and thoughtfulness, class counsel will be able to design effective settlements that offer appealing benefits to class members, who will respond positively to the effort.

Furthermore, this Court has no doubt that class action lawyers, who have demonstrated their resilience in the face of previous developments in class action law, will adjust their methods and mindset to cope with the new fee regime. *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1606 (2008) ("Understanding the [Class Action Fairness Act of 2005's] impact requires an appreciation of the resilience of mass litigators."). With regard to methods, class counsel may learn to work more efficiently, such that the awarded fee provides them with satisfactory compensation vis a vis the amount of time spent on the litigation. With regard to mindset, some resistance to and grumbling about a cut in pay is to be expected. It is not, however, as if class counsel currently bill time at bargain-basement rates. Even a modest reduction in fee awards would still offer class counsel an objectively lucrative field of practice. The Court does not believe that the plaintiffs' bar as a whole will throw up their hands and abandon class action litigation so long as there is still money to be made, even if that amount is not quite as much as it was in the past.

It is much like diners complaining that their dinner has been reduced from six courses to four. The diners' disappointment about this development is understandable; the food is good, and the diners are accustomed to the additional courses. Nonetheless, the scaled-back meal still provides an abundance of food. Most diners will realize this and be content, and even if some diners leave in a show of protest, there are other hungry people who will be more than willing to pull a chair up to the table.

V. THE FEE AWARD

Notwithstanding the foregoing discussion, the Court concludes that an award of attorneys' fees in the amount of $6,500,000 is reasonable in this case. As an initial matter, class counsel put forth a lodestar of $3,300,000, which is a presumptively reasonable fee. *Lipsett* v. *Blanco,* 975 F.2d 934, 937 (1st Cir. 1992). In addition, the suggested multiplier of 1.97 is within the range that has been recognized as reasonable. *See, e.g.*, *In re Tyco Int'l, LTD. Multidistrict Litig.*, 535 F. Supp. 2d 249, 271 (D.N.H. 2007) (applying lodestar multiplier of 2.697); *In re Relafen*, 231 F.R.D. at 82 ("A multiplier of 2.02 is appropriate.").

Furthermore, the majority of factors generally considered when evaluating a fee award weigh in class counsel's favor in this case. For example, Class Co-Lead Counsel is comprised of qualified attorneys from firms experienced in this type of litigation, *see* Ex. 3 to Levy Aff. [Doc. 353 Ex. 4]; Ex. 3 to Savett Aff. [Doc. 353 Ex. 8], and counsel demonstrated more than satisfactory skill and effort in the course of their advocacy. In addition, class counsel spent a significant amount of time on this case – almost 8,000 hours. And, as noted above, only a handful of class members expressed opposition to the attorneys' fees provision of the Agreement.

Indeed, the only factor that caused the Court to pause was the relation of the fee award to the benefit conferred on the class by the litigation. Although class counsel assert that the litigation created over $200,000,000 in benefits, the Court is disinclined to credit this figure because this amount was reached by reference to the payout caps provided for in the Agreement. For example, the Agreement provides for $10,000,000 in vouchers or checks to self-certifying customers, *see* Agreement ¶ 2.2(a), $7,000,000 in checks to customers who submit documentation of their losses, *id.* ¶ 2.2(b), and $1,000,000 in reimbursement to unreceipted return customers who sustained losses of $60 or more due to identity theft, *id.* ¶ 2.1(c)(iii). These numbers are illusory. A benefit on paper is meaningless if class members do not satisfy the prerequisites to claim it.

Consider, for example, the $1,000,000 set aside for reimbursement to unreceipted return customers for identity theft losses. The parties present no basis, such as evidence of how many class members experienced such losses or in what total amount, upon which they concluded this benefit could, in theory, be transferred up to the payout cap to class members. Moreover, not one of the almost 5,000 people who has attempted to recoup losses under this provision has been successful. Similarly, although common sense would have dictated that *some* class members experienced the requisite losses to claim the checks or vouchers – and indeed, that some would have documentation to prove it – that does not mean that the parties believed that so many class members fulfilled the requirements that the $10,000,000 and $7,000,000 caps would be reached.[17]

The Court, however, is satisfied that the Agreement creates a concrete benefit insofar as it provides that unreceipted return customers could receive credit monitoring services. The parties identified ex ante specifically how many class members were eligible to receive this benefit; indeed, the definition of "unreceipted return customer" encompassed only those customers contacted by TJX and told that their information may have been stolen. The parties also determined with certainty the value, it the form of the cost of the credit monitoring subscription, that would be transferred to each unreceipted return customer who made a claim. Therefore, unlike the figures attached to other benefits – for which it was unclear how many class members, if any, might qualify and what amount they might claim[18] – the $177,000,000 attributed to this benefit has meaning. Accordingly, the Court is comfortable characterizing this litigation as creating $177,000,000 in potential benefits for the class and using this figure as a benchmark against which to measure the award of attorneys' fees.

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[17] Simply referencing the number of accounts compromised in the breach is insufficient for this purpose. The submissions in the financial track litigation established that a significant number of the accounts had expired or been cancelled at the time of the breach, such that consumers could have suffered no losses.

Although the Court remains concerned about the fee award with relation to the amount of value actually transferred to class members, it did not give class counsel any indication prior to the Fairness Hearing that its award of attorneys' fees might be made with reference to this criterion. It would thus be unfair to act – in this case – on its institutional concerns to class counsel's detriment.

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[18] With regard to identity theft losses on the part of unreceipted return customers, these theoretically could range from de minimis to hundreds or even thousands of dollars. For the class members who suffered $5 in losses as a result of the breach – the number of which appears not to have been known by the parties to any degree of certainty – and were thus eligible to claim vouchers or checks, there was no way to know how many might be self-certifying (and thus eligible for $15 checks or $30 vouchers) or how many might have documentation (and eligible for double these amounts).

VI. CONCLUSION

A common theme recited by class action lawyers when confronted with concerns about fee awards disproportionate to benefits actually disbursed to class members is, "You can lead a horse to water, but you can't make him drink." *Sylvester*, 369 F. Supp. 2d at 49. In this case, for example, class counsel argued that the Court's proposed linkage of fees to benefits claimed was not "fair" because counsel "made much, much more available to people than they chose to accept," Fairness Hearing Tr. at 6, and because the low claim rate was not class counsel's "fault," *id.* at 12. This may be true, but it stands to reason that one can maximize the chances that a horse will drink by, for example, verifying the horse can see the water, choosing clear, fresh, and cold water so that the horse is given the utmost incentive to drink, and making sure there are no obstacles in the horse's path. This Court plans to ensure that class counsel does everything in their power "to ensure that the settlement provides real value (or, to extend the metaphor of the just quoted aphorism, 'actual drinks')" to the class. *Sylvester*, 369 F. Supp. 2d at 49.

The petition for an award of attorneys' fees in the amount of $6,500,000 [Doc. 353] is GRANTED. In the future, however, plaintiffs' counsel can expect that this Court, when confronted with reversionary common fund or claims-made settlements, will award attorneys' fees *by reference to the value of benefits actually put in the hands of the class members.* This strikes the Court as the best way to encourage settlements that actually serve the needs and desires of the class as well as a solid first step toward bettering the effectiveness and efficiency of the class action vehicle as a whole by providing an incentive to its key players to begin looking for solutions to its problems.

SO ORDERED.

s/s William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE